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PAUL BUREAU

PROFESSOR OF INTERNATIONAL PUBLIC LAW AT THE CATHOLIC INSTITUTE
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THE
ITALO-COLUMBIAN DISPUTE
(The Cerruti Affair)

THE STATUS OF ALIENS

ACCORDING TO INTERNATIONAL PUBLIC LAW

AND THE DEFECTS IN THE PRESENT PROCEDURE OF INTERNATIONAL ARBITRATION

PARIS

ARTHUR ROUSSEAU

Soufflot Street 14

1899



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THE
ITALO-COLUMBIAN DISPUTE

THE DEFECTS IN THE PRESENT PROCEDURE OF INTERNATIONAL ARBITRATION

BY THE SAME AUTHOR

La diminution du revenu et la baisse du taux de l'intérêt,
1 in-18 vol. (Firmin-Didot).

Le homestead ou l'insaisissabilité de la petite propriété foncière, Mémoire couronné par l'Académie des Sciences morales et politiques. Prix Rossi pour l'année 1894, 1 in-18 vol. (A. Rousseau).

L'association de l'ouvrier aux profits du patron et la participation aux bénéfices, Ouvrage couronné par le *Musée social*, Concours 1896 (A. Rousseau).

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Rec. Dec. 4, 1899.

In the year 1883, the possessions of Mr Ernesto Cerruti, an Italian subject residing in Columbia, were confiscated by an administrative decision of the local authority; the Italian government immediately took his cause in hand, and entered upon long negotiations with Columbia : several times grave difficulties arose and it is only lately that the « Cerruti Claim » has been finally settled. 2/

The government of Columbia has done the author of these pages the honour of asking him to retrace the various incidents of which, during a period of fourteen years, this claim has been the occasion.

If, after a minute study of the voluminous legal documents of this affair and of the exceedingly abundant diplomatic correspondance of which it has been the subject, I have accepted this mission, it is because it appeared to me that the perfectly straightforward and correct attitude always observed by the Columbian government had not been appreciated in Europe as it ought to have been (1) and that perhaps the Cerruti case

(1) The French and English press, naturally disposed to reproduce the particulars given in the Italian news-papers, has pu-

was a new episode to be added to the history — already too long and too well known — of the abuses of force of which European States have sometimes been guilty towards the republics of Central and South America.

e/ So long as twenty-four years ago, Mr Pradier Fodéré[^] pointing out these abuses, spoke eloquently of the mission of this juriconsult « who, whilst the cannon thunders against the weak, raises an impartial voice and proclaims the verdict of justice » (1).

That is the function which I propose to fulfil ; I hope to convince the reader that although I have undertaken the task at the initiative of Columbia, this circumstance has not led me to depart from the attitude proper to a professor of international public law, who has

blished erroneous comments on the Cerruti case, and even the leading journals have fallen into the same mistake. An impartial statement of the facts will show that their good faith has been misled.

(1) Pradier Fodéré. Address delivered at the opening of the course of the Faculty of Political and Administrative Sciences of the University of Lima and of the course of Encyclopedic Law; extract reprinted in the *Traité de droit international public européen et américain* by the same author, Paris, Pédone Lauriel, 1885, vol. I. p. 341. — In the same address M. Pradier Fodéré speaks of the émigrants « who have no taste for hard work and meet with unexpected obstacles. It is the time of murmurs, recriminations, complaints. Diplomats, the vigilant guardians of the interests of their fellow countrymen, intervene in the conflict. Guided often by political rather than humanitarian considerations, they entrench themselves behind arbitrary ultimatums » How many examples testify to the accuracy of this judgment !

always kept his eyes fixed on the serene figure of justice and right.

Moreover the history of the Cerruti claim is instructive from other points of view : it is of a nature more particularly to encourage publicists and diplomatists to improve the still rudimentary procedure of international arbitration.

I

Mr Ernesto Cerruti (1) was born at Turin in 1844 ; after serving with the Garibaldian forces he emigrated to Columbia in 1869 and some months later he was appointed Italian consular agent. Two years afterwards he married, without religious ceremony (2), a young woman of Columbian nationality, and in March 1872, he already gave evidence of the closeness of his alliance with the most advanced section of Liberals, one of the

(1) All the facts related in these pages are supported by the testimony of the mediator, the commissions of arbitration, and the arbitrator, to whom the dispute was successively submitted, the author having on no occasion contented himself with the statements of the persons concerned, when they were not confirmed by a specific document or the admission of the party interested in rebutting them. The biography of Mr Cerruti, more especially, is largely borrowed from the preamble to the proposition of mediation of the Spanish government.

(2) This circumstance is only noticed in order to show at once the philosophical opinions of Mr Cerruti. Indeed the ardour of his convictions was the indirect cause of the events which will be narrated. Besides Mr Cerruti was fond of declaring his views, « for » he wrote only last year « hatred and persecution of the jesuits are my highest satisfaction, inasmuch as they are the best proof that I am neither a fool nor a knave. » Letter of Mr Ernesto Cerruti to the *Journal des Débats* (published in the issue of August 23th 1898).

two political parties of the country, by signing with General Jérémias Cardenas, then President of the state of Cauca, a contract, for the supply of guns and ammunition. This contract, which was to be carried out with the greatest secrecy, gave rise subsequently to numerous comments, the echo of which was heard in the Parliament of Cauca in 1873 and in the precincts of the tribunals in 1879.

On February 27th 1873, Mr Cerruti founded a *société en commandite* under the firm or style of E. Cerruti and Co with a capital of 25,000 piastres. The house was to carry on a varied business, more especially the purchase and sale of salt. In order fully to appreciate the special character of this partnership, it must be borne in mind that the three partners of Mr Ernesto Cerruti, namely Messrs Jeremias Cardenas, Lope Landacta and Ezéquiél Hurtado, were three generals of the Republic of Columbia, and that the price of salt, which was about two francs, rose in a few days to 4 piastre (5 francs).

Mr Cerruti took an active part in the political events of 1876, and in February 1877 we find him at the head of the escort which conducted the Bishop of Popayan, Mr Bermudez, into exile.

By a notarial deed dated July 28th 1879 he founded with the two generals Jeremias Cardenas and Ezequiél Hurtado, Messrs Virgilio Quintana and José Quilici, all recognised leaders of the advanced Radical Party, a

société en commandite, under the name of E. Cerruti and C^o. In this partnership deed, the entire text of which is reproduced in the official documents, four clauses deserve attention. By the terms of article 2 « The only one of the members of the association to furnish the capital is Senor Ernesto Cerruti, which capital is to consist of one hundred and six thousand three hundred and twenty two pesos two hundred and sixty-five mills ; the other partners are active. »

o/

According to article 6 : « the profits will be distributed in the following manner : 30 per cent to M^r Cerruti and 17 1/2 per cent to each of the other partners. »

Article 20 stipulates that « The partners having agreed to execute a private document for the purpose of settling the interests connected with the house which is established by the present instrument, which document shall be considered as trustworthy evidence of the rights and obligations which each one of the partners is to reciprocally assume in said document, this compact is to be considered as the complement of that which stipulates the association in this instrument. »

Last of all there is article 21 : « Although by the law of nations aliens are protected, which protection can be enforced without any express convention, the members of the firm remain under the international guarantee which Senor Cerruti represents as the owner of the capital of the said firm. »

It is difficult to pronounce a favourable judgment on

this partnership deed. *Article 2 was certainly at variance with the truth.* If we take the balance sheet of the firm E. Cerruti and C^o as it was drawn up, after an agreement established between the Italian and Columbian governments, according to the state of the books at the time of the suspension of business (Jan-Feb. 1885), by two experts, one Italian and the other Columbian, we see that the other partners also contributed capital and even that this capital notably exceeded that contributed by Mr Cerruti (1), a fact which is confirmed by the explicit testimony of the advocates of Mr Cerruti at the tribunal of arbitration at Washington (2). Moreover, what could be the contribution in labour of these four politicians, of whom two were generals? It is better not to inquire. Moreover if no one except Mr Cerruti had contributed funds, the distribution of profits, as determined by article 6, would not have been fair, since in fact it was understood that he should be sole manager, as he was in reality.

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(1) Thus to the business at Popayan — separate accounts were kept in connection with each business — Cerruti contributed 33,476 piastres, Jérémias Cardenas 57,705, Ezéquiél Hurtado 50,508.

(2) At page 176 of the statement presented by these learned advocates, we read indeed that Mr Virgilio Quintana had contributed 33,269 piastres, Mr Jérémias Cardenas 57,705 piastres, Mr Ezéquiél Hurtado 50,508 piastres, and Mr José Quilici 40,225. The aggregate contribution of these four members amounted therefore to 181,707 piastres and consequently represented about three fifths of the partnership capital.

If then, without allowing ourselves to be deceived, we compare articles 2, 6, 20, 21, the object pursued by the partners becomes perfectly obvious. These partners knew how advantageous it is for an individual in any of the states of Central and South America, to be able to plead foreign nationality. >/

In these countries the foreigner enjoys peculiar immunities and privileges, and he can rely on the special vigilance of the courts for the defence of his rights. The administrative authorities take good care not to molest him, and in time of civil war, when the persons and property of the citizens are, too often, the object of unjust measures, he has only to hoist on his house the flag of his country and his dwelling becomes a sacred islet against which no one dares to lift his hand; and if by chance, in the heat of the struggle, one of the two political parties departed from this reserve, it is almost safe to say that this violation would be a fortunate event for the foreigner, since he has the certainty of obtaining an indemnity four times as great as the loss suffered. International public law requires foreigners to submit to the same treatment as the people among whom they reside, it does not ask for them any favour, but it does not tolerate to their detriment any denial of justice. In fact European diplomatists have too often, under the pretext of protecting their fellow countrymen, claimed exorbitant privileges for their benefit. It is hardly necessary to recall to the reader the t/

blockade of the ports and roadsteads of the Argentine Republic, established in 1838, for a trifling cause, by England and France, and maintained for ten years : the Mexican Expedition in which France pursued the strange object of imposing an emperor of her own choice upon another people : and lastly, the singularly summary measures adopted by England in 1895 for the settlement of her dispute with Venezuela. It is sufficient to say that all professors of international public law and all writers on the subject are unanimous in recognising that European States exercise an excessive vigilance in defence of the rights, real or pretended, of their subjects living in South or Central America. « The history of the relations of the republics of Spanish America with Europe », says a learned publicist, « offers continual examples of claims and demands for pecuniary indemnities. These claims, put forward on grounds which in many cases it would be difficult to justify and which are always considerably exaggerated, are usually presented with a threat to resort to armed interference, if necessary, in order to enforce them. As these proposals, or rather demands, come from strong to weak states, they usually end in pecuniary compensation being accorded without liquidation or previous examination of their legitimacy (1) ».

(1) Pradier Fodéré, *Droit international public*, § 1^{er}, p. 620.

This state of things is well-known on the other side of the Atlantic, and the partners in the firm E. Cerruti and C^o knew perfectly well what they were about when they inserted in the deed article 21, quoted above, and decided in a clause, the impropriety of which from a legal point of view is evident, that M^r Cerruti, an Italian subject, should be considered to be the proprietor of the capital of the firm of E. Cerruti and C^o. Let us add at once that this clause testifies also to the favourable situation accorded to foreigners from this time forward by the government of Columbian.

Be that as it may, the firm of E. Cerruti and C^o, established in conformity with Columbian law, constituted a civil personality, and its legal identity was distinct from that of the partners; besides its nationality was Columbian, and in case of dispute with the administrative authorities, it could consequently only resort, like any Columbian citizen, to the ordinary courts of the land. It is important to bear in mind these two points, the importance of which will be perceived.

The firm of Cerruti and C^o established successively four principal places of business in the Columbian towns of Palmira, Popayan, Cali and Bonaventura, and was carrying on its transactions with various alternations of profit and loss, when the events of 1885 took place.

It is difficult to ascertain the exact object pursued by

i/ the founders of this firm formed by a merchant and four politicians of note ; at any rate it is scarcely a matter for surprise when we hear that during the years which preceded the insurrectionary movement of January 1885, Mr Cerruty took an active part in Radical politics (1).

Moreover, two of his partners, General Hurtado and General Cardenas, had been notable Radical leaders. Indeed the first of these two generals was, about the year 1880, president of the state of Cauca, and a profound enmity existed between them and Generals Payan and Ulloa, who were respectively president and secretary of the government of Cauca (2).

Accordingly, wrote Mr Cerruti, some days before the revolution broke out, the government of Cauca telegraphed to the President of the municipality of Cali to confiscate all my goods, if any rising took place.

On January 19th 1885 a battalion of the Columbian Guards revolted at Cali and formed a provisional go-

(1) Mr Cerruti has declared that the conservative party regarded him with sentiments of very marked hostility.

« I had renounced » said Cerruti, « the catholic faith in which I was raised ; my marriage had been a purely civil affair and I was much in disfavor with the clergy. »

Deposition of Cerruti, accompanying the statement submitted by M. Frédéric Coudert, on the occasion of the arbitration, to Mr Grover Cleveland, President of the United States, p. 7.

(2) Deposition of Cerruti, loc. et op. cit. — Thus at a dinner given in 1884 by General Hurtado, General Payan announced publicly in a speech that if the members of the firm of Cerruti rose

vernment ; it was the signal for various risings in the state of Cauca and throughout the Republic. This act caused a great sensation, for the culprits were not only guilty of insurrection, but of veritable treason.

The exact extent of M. Cerruti's participation in the insurrectionary movement of January and February 1885 was afterwards sharply contested by the Italian and Columbian governments. At any rate it is beyond question that the property at Salento, which served M. Cerruti as a residence, was one of the last refuges of the insurgents, and that a canon, a guncarriage, and the traces of a camp were found there (1).

It is almost superfluous to add that the other members of the firm, particularly the two Generals Hurtado and Cardenas, took a specially active part in the disturbances.

On February 11th, the government of Cauca declared « in conformity with the provisions of the law » that « M. Ernesto Cerruti had lost his character of neutrality during the present insurrection » (2) and on the following day the chief of the municipality of Cali decided that M. Cerruti « having forfeited his neutral character

against the government, he would put himself at the head of 500 men for the purpose of pillaging their premises and would not leave a single thread.

(1) It appears also that Mr Cerruti supplied the insurgents with assistance in money.

(2) *Official publication submitted by the Republic of Columbia to the President of the United States*, page 9.

was liable to the charges and responsibilities resting upon Colombian citizens » ; also, in conformity with the provisions of law 38, year 1897, of the state of Cauca, « the personal property of the said Cerruti, and that which he possesses in conjunction with the rebels Ezequiel Hurtado and Virgilio Quintana, are declared by condemnation as belonging to the state, and the proceeds are applicable to the expenses of the war » (1).

It is necessary to lay stress on the nature of this act, which was the source of the inextricable difficulties among which the sagacity of Italian and Colombian diplomatists was to exercise itself for fourteen years.

Among the grounds set forth in the sentence of confiscation was the violation of neutrality committed by Cerruti, and in virtue of this fact, it affected not only the possessions belonging specially to Mr Cerruti, but in addition all the possessions of the firm of E. Cerruti and C^o; now this firm certainly constituted a civil personality and had a separate estate which was in no way the joint property of the partners. The latter had only a part, an interest, a share in the firm, according to the name one may choose to give it. Now, *it was not this share of Mr Cerruti that was confiscated, but the entire estate of the firm* (2). The government of

(1) Eod. op., p. 114.

(2) The terms of the sentence of confiscation, reported above.

Cauca, considering all the partners in this firm as rebels, thought proper to confiscate the entirety of the firm's estate and when, some months later, it recognised that José Quilici had remained neutral during the insurrection, it contented itself with paying him an indemnity (1).

The moment had come to invoke the international guarantee contemplated by article 21 of the partnership deed of 1879. The opportunity was not missed and there is ground for presuming that the former relations of Mr Cerruti, as well as the fact he had at one time been the Italian consular agent, added to the weight of the claim which he immediately addressed to Mr Segré, the Italian *chargé d'affaires*, at Bogota. On April 15th 1885, the latter made a protest, in due form, to the minister of foreign affairs of the Columbian government, Mr Restrepo, with reference to the acts of pillage

only affect, in their literal sense, the portion, which in each of the firm's properties, might be considered — if one forgets that the firm was morally a person — as belonging to Mr Cerruti, but in point of fact the government of Cauca, considering the other partners as rebels, confiscated the whole.

(1) I have vainly sought to ascertain the amount of this indemnity. The information would however be valuable, for it would make it possible to determine approximately the value of the net assets of the firm of Cerruti and Co. — The granting of this indemnity shows that the Columbian government took action against Mr Cerruti not because he was a foreigner, but because he was regarded as a rebel. Indeed M. José Quilici was a compatriot of Mr Cerruti, whilst the other partners, whose possessions were likewise confiscated, were of Columbian nationality.

and brigandage committed on the property at Salento, belonging to an Italian subject; he also objected to the confiscation of this property as well as the other possessions — whether consisting of real or personal estate — seized at Cali, Palmira, and Popayan (1). He asked at the same time that a passport should be granted to Mr Cerruti in order that he might go to Bogota to lay his complaint himself and prove « the untruthfulness of the accusations brought against him by the government of Cauca. »

This first demand, perfectly moderate and courteous so far as its form was concerned, was the origin of diplomatic correspondance exchanged at Bogota during the second three months of 1885, between the Italian minister and the Columbian government.

The negotiations did not make rapid progress, owing both to the natural difficulty of communication in an immense territory still thinly peopled — a difficulty augmented by the risings of the moment — and to the political constitution of Columbia.

(1) When he drew up this note the Italian diplomatic agent believed all the possessions confiscated to be the private property of Mr Cerruti; but as a matter of fact all the land and buildings, as well as the goods and cattle, belonged to the firm E. Cerruti and Co. With respect to the property at Salento in particular, Mr Cerruti contended that this *hacienda*, with its working plant, was private estate, belonging to himself, but there is nothing to justify this assertion, which is in direct contradiction to the title deeds; *vide infra*, Appendix.

The latter was then a federal state, the constitution of which, modelled on that of the United States of North America, left a large measure of independence to the local government of each state (1).

It is well known that federal states, the constitution of which offers so many guarantees to individual liberty, since it allows each area to have legislation and administration specially suited to its social condition, are less fortunately situated with regard to international relations : foreign governments, only empowered to recognise the central authority, sometimes urge upon it measures which the constitution does not permit it to take, and the federal authority, the only one responsible so far as external relations are concerned, has to rely upon its skill and tact for inducing the local government to make concessions which it cannot compel. There is a contradiction between the external obligations of the federal authority and the rights recognised to it by the constitution in internal affairs. It is this difficulty known to all jurisconsults who have given attention to the subject of international public law, which, in 1891, was the origin of the delicate questions raised by the lynching of some Italians at New

(1) Since the insurrectionary movement of 1885 the Columbian constitution has been altered and local powers have been restricted ; the territory of Columbia is now no longer divided into states, but into departments.

Orleans and in 1885 rendered more complicated the examination of Mr Cerruti's claim.

Be that as it may, in all his despatches, to the Italian minister, Mr Vicente Restrepo showed himself determined to respect equally the requirements of justice and the principles of the law of nations (1).

As soon as he had occasion for suspecting (2) the government of Cauca of not observing in the case the impartiality which every man called upon to meet an accusation is entitled to expect, he resolved to make representations personally to that government. The decision was wise, because, just after a violent struggle, it is difficult for a political party to treat with per-

(1) « In the present case, so long as we treat only of an administrative measure regarding a neutral alien in the civil contest, your honor will find on the part of the government the good will, which I flatter myself it entertains towards Italian subjects, and you will receive repeated demonstrations of its cordiality in the interest of the friendship which binds the two nations. Should the matter invest another character, I am flattered by the confidence that your honor will give the government of Colombia another proof of your spirit of justice by recognizing the independence of the authorities of the Republic in the exercise of its jurisdiction over the offences or crimes committed in the national territory. — Note of the 24th of June 1885, addressed to Mr Segré. — *Official publication*, p. 13.

(2) The government of Cauca had refused the passport demanded for Mr Cerruti on the ground that he was the object of legal proceedings. Now the Italian minister proved to Mr Restrepo that other persons proceeded against had nevertheless obtained passports.

t/fect equity those who, right^{ly} or wrongly, are accused of having directed an insurrectionary movement[^] and the federal authority of Bogota, to which Mr Cerruti was unknown and which had never been directly attacked by him, alone presented the indispensable guarantees. s/

>/ In this note Mr Vicente Restrepo begins by entering into a minute legal discussion to demonstrate to his correspondent that the law of Cauca, on which the executive power of that state relied in pronouncing sentence of confiscation[^] is not applicable; in any case that law ought to be considered abrogated by article 15 of the federal constitution, in harmony moreover with the principle of the law of nations acknowledged by Christian countries : « The latter reject a practice the effect of which would be to take away all stimulus to work, and would give rise to endless reprisals among the sons of a nation threatened ever by the misfortunes of civil discord (1). »

Continuing his note, Mr Restrepo afterwards attempts to show that the Cerruti case is withdrawn from the local jurisdiction of Cauca by the nationality of the plaintiff, and comes unquestionably under the jurisdiction of the federal authorities. In order to make his contention more acceptable, he refers to the general principles of law which govern the status of aliens

(1) *Official publication*, page 388.

and shows that these principles have not been observed.

2/ Regular judicial proceedings, if I may rely on the documents which have reached my department, have not yet been opened, and the evidence obtained so far is in general wanting in the judicial weight necessary for a thorough discussion... In foreigners, the general principle, the presumption of law[^] is neutrality : the exception is the violation of their neutral character. Therefore it is necessary that this exception shall be irrefutably proved in order to proceed according to law.

... The laws ought to be applied to foreigners just as much as to native residents, and it is evident that if a foreigner has taken part in an insurrection, his nationality will be an aggravating circumstance. But if this line of conduct is easy with respect to armed enemies, it is difficult to follow when treating of these who are barely accused, like Cerruti, of a secret support of the rebels, and who have had the care to blot out the marks of their political complicity.

In concluding M^r Restrepo transmitted to the Secretary of the State of Cauca « the order of the president of Columbia to return to Senor Cerruti the real property of which he may have been despoiled and as regards the personal property which, by reason of the necessities of war, may have been taken from him, it be endeavoured to arrive at the value, kind and nature thereof, without prejudice to the investigation of the participation of this Italian subject in the civil war » (1).

3/

To find fault with M^r Vicente Restrepo for having ex-

(1) *Official publication*, page 391.

pressed the ideas contained in this note, inspired by the spirit of justice and full of elevated sentiments, one would have to forget what must inevitably be the state of mind of a man placed in his situation. On the one hand he feared to hurt the susceptibilities of a local government always inclined in a federal state to defend itself against the encroachments of the supreme power ; on the other hand his sense of fairness led him to dread the excesses of political passion : he knew the ardour with which European states support the claims of their subjects, even when ill-founded ; and therefore he wished to be absolutely certain that, in the Cerruti case, right was irrefutably on the side of Columbia.

But, under benefit of this reserve, it must be recognized that Mr Restrepo was not sufficiently informed with respect to the conduct of Mr Cerruti ; the disapprobation expressed in this note afterwards became a formidable weapon in the hands of Italy, and in its subsequent mediation, the Spanish government had only to avail itself of these admissions in order to give its decision against Columbia.

Matters were thus in a fair way of being settled, and there was no reason to doubt that in a few days the incident would be amicably arranged to the satisfaction of the two parties. Mr Segré knew the straightforwardness of Mr Restrepo so well that no later than July 20th, that is to say a week before the letter of the

minister for foreign affairs was written, he hastened to testify unreservedly his appreciation (1).

Diplomacy then was pursuing without difficulty its habitual work of peace and justice, when an extraordinary incident occurred, which immediately rendered an understanding impossible and even brought about a rupture of diplomatic relations.

At the beginning of the month of July 1885, the Italian Cruiser *Flavio Gioia*, which then happened to be at Panama, received the order to sail for Bonaventura « for the purpose of obtaining information respecting the Cerruti case », and on the 6th of July, she cast an-

(1) « Mr Minister,

« Through the most esteemed note of the 18th inst., after mentioning the spirit of justice which animates the Columbian government in the decision of the questions relative to Italian subjects domiciled in Cauca, Your Excellency does me the honour to inform me that the most excellent President has resolved to intervene personally with the government of Cauca and that he desires to afford me an opportunity of a conference *so soon as the restoration of the telegraph lines shall render it possible for him to carry out his purpose.*

« It is my duty, and I comply with it with a lively satisfaction, to extend my thanks to Your Excellency for this important communication. Moreover in begging Your Excellency to be pleased to convey to the Very Excellent President my grateful sentiments for this new proof of kindness towards the subjects of the King, I hasten to place myself at your disposal for the proposed conference.

« Pray accept sc.

« D. SEGRÉ. »

Official publication, p. 26.

chor in the roadstead of that port. Immediately on her arrival, Commander Cobiauchi addressed to Mr Cerruti a telegram couched in these terms : « *Come here immediately.* » The authorities of Cali informed the Italian Commander that Cerruti had been forbidden to leave the town. Cobiauchi replied « that according to the strict orders of the government of his Majesty the King of Italy he would not leave the roadstead before having an interview with Mr Cerruti. »

The Secretary of the state of Cauca « authorized Cerruti, accused of the crime of conspiracy, to go aboard the *Flavio Gioia* on condition that the Commander pledged himself upon his honour to send back Cerruti without delay, in order that the latter might remain amenable to the jurisdiction of the authorities of Cauca ». This condition *was formally accepted* by Commander Cobiauchi on July 8th (1).

Cerruti, accordingly went to Bonaventura, where he remained during the month of July under the protection of the Italian Commander.

On August 4th the examining magistrate of Cali, after fulfilling the ordinary formalities of procedure,

(1) « The consular agent of his Majesty the King of Italy has sent me the official communication emanating from the office of the municipal chief dated this day, with respect to the permission to confer with me granted by the executive power to Ernesto Cerruti, under my word of honour that at the end of the interview, I will again place the said Cerruti at the disposal of the authorities of Cauca. » — *Official publication*, p. 119.

made an order by the terms of which Cerruti was handed over to the jurisdiction of the criminal courts, and, at the same time, he signed a warrant for the arrest of this Italian subject, accused of the crime of rebellion, a crime punished by articles 133 and 143 of the penal code.

2 / Cerruti hastened to communicate this decision to Commander Cobia^hchi who immediately resolved to resist by force the removal of the prisoner outside the town.

The commandant has himself given an account of the measures taken in a report published in 1886 by the Italian government (1).

2 / On August 5th, at eight o'clock in the morning, states the Commander, Mr Cerruti was arrested by the chief of the municipal police without my being informed whence the order of arrest issued. I did not lose a moment ; good will responds to good will, violence to violence. I immediately armed my boats to invest the town (2), the bridge which connects the island with the mainland was guarded by two boats, one of w^hich carried a Hotchkissgun, and I had made arrangements to blow up this bridge if necessary. At the same time, I summoned the chief of the municipal police to tell me what authority had ordered the arrest... The chief of the police replied at once, protesting against the violence employed. I thought on my part that it was desirable, in order to 11 /

(1) *Green book*, 1886, p. 26.

(2) The town of Bonaventura is built on an island and this circumstance facilitates an investment.

avoid accidents, that all trains leaving Bonaventura, should stop before crossing the bridge to receive a visit from one of my officers. These measures were maintained throughout the day of August 5th and the following night. Cerruti was set at liberty the next day (1).

Commander Cobiauchi was reminded of his word of honour and the unmistakable precision of the phrase contained in his despatch of July 8th : but he contented himself with the reply « that he had received from his government imperative orders to request that Senor Cerruti should be left free in Bonaventura under his word, and that he be given all the necessary security without any consideration for other precedents » (2).

On August 9th the Italian Commander informed the municipal authorities that Cerruti would remain aboard, and « as the Italian government does not intend in any way to disturb the course of justice in a foreign country, but desires only that it shall be administered to its subjects with every guarantee, I declare Senor Cerruti will be placed at the disposal of the competent authorities when the negotiations now on hand between the government of the United States of Columbia and that of his Majesty the King of Italy have reached a settlement satisfactory to both parties » (3).

(1) *Italian green book*, 1886, page 27 and appendix.

(2) *Official publication*, p. 133.

(3) *Official publication*, p. 133.

I refrain from passing judgment on such conduct on the part of a naval officer (1).

Even in the absence of any previous pledge, this violent intervention would have been contrary to the best established principles of the law of nations. Of course it is easy to understand the indignation of the Italian agent when he heard of the arrest of M^r Cerruti, for he regarded it as an implied part of the arrangement of July 18-20 that the government of Cauca should not arrest M^r Cerruti; and his resentment appeared in a note dated August 8th (2). But a perusal of the diplomatic correspondence shows with absolute certainty that if the Italian minister plenipotentiary alone had had to defend the rights of his compatriot, this unfortunate arrest would not have entailed grave consequences. M^r Restrepo had kept the engagement which he

(1) It is important to add at once that despite the plea of superior orders, put forward by Commander Cobiauchi, the Italian government must not be considered guilty of complicity in this violation of a pledge; it certainly was not aware of the specific engagement taken by one of its officers, Commander Cobiauchi only having forwarded incomplete information.

(2) « If General Payan had no knowledge of the agreement established between the Italian legation and the government of the union, an agreement by the terms of which any modification of the present status was implicitly prohibited, I have the right to complain because he was not notified. If on the contrary General Payan, duly informed of this accord thereof desired to make its realization impossible, through a new arbitrary act it is my duty to condemn it and to demand prompt justice for Italian interests and rights, once again and seriously violated. » *Official publication*, p. 22.

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had entered into on July 18th, and the letter addressed to the Secretary of the State of Cauca on July 29th ^{>/} *which had not yet come to the knowledge of the Italian diplomatic agent*, shows that this promise had been kept with scrupulous loyalty; to my knowledge, it has never been established that the authorities of Cauca received M^r Restrepo's letter before the day when the warrant of arrest was issued (1), and even if the contrary were true, the violent measures, taken by Commander Cobiañchi would be no less deserving of reprobation.

When a diplomatic agent has obtained a formal assurance that the compatriot in whose favour he intercedes will be treated in conformity with the principles of justice and right, recourse to measures of constraint is always illegitimate, even if a subordinate official should commit an act in contradiction to a specific engagement. What country in the world can guarantee that none of its agents will commit an abuse of power, and is not this guarantee still more impossible in the case of federal states? When the responsible ministers of a nation have entered into an engagement, the foreign government, with whom this engagement has been taken, may not resort to violence as long as the

(1) It must not be forgotten that telegraphic communication was very defective at this moment. M^r Segré himself testifies to the fact. Vide note *supra*, p. 22.

ministers have given no proof of bad faith or impotence. The central power will know how to make its will respected and to take rapidly the necessary measures. Under these conditions, what is the use of investing a peaceful town and threatening to blow up the bridges ? (1)

The news of the acts of commander Cobiañchi aroused strong feeling at Bogota and on August 12th Mr Restrepo addressed to Mr Segré a very firmly worded protest in which he expressed his intention of suspending diplomatic relations « unless explanations were forthcoming, compatible both with the law of nations and the maintenance of the dignity of the Columbian government » (2).

Three months later the minister also addressed a circular to the diplomatic corps drawing attention to « the double wrong inflicted on Columbia, a victim both of bad faith and the violation of its rights » (3).

For three months longer the negotiations were conti-

(1) It is always dangerous to entrust to a naval officer the negotiation of an affair dealt with, at the same time, by the diplomatic agent, above all when these two have no opportunity of keeping in constant communication with each other. The temperament of soldier is impatient of the delays and details of diplomatic negotiations, and states should always expressly enjoin upon the commanders of cruisers only to act on an order from the legation ; otherwise the presence of the cruiser no longer serves to support the claim : it makes an understanding impossible.

(2) *Official publication*, page 31.

(3) *Official publication*, page 136.

nued between the minister plenipotentiary of Italy and the Columbian minister of foreign affairs. They did not lead to any result : Italy refused to admit that the events of Bonaventura called for the appointment of a commission of arbitration and the government of Bogota declined to submit the Cerruti question to arbitration unless a mixed commission were at the same time instructed to inquire into the acts of commander Cobiaichi. At length on December 16th diplomatic relations were definitely suspended between the two countries and some days later the Italian Pacific squadron received the order to cruise in the neighbourhood of Columbia.

II

It was now only possible to bring the two states together through the medium of a third power. Spain offered her good offices and they were accepted ; it was not long even before she was asked to act as mediator.

Columbia committed a grave imprudence in the negotiations opened in view of this mediation and considering the practical and utilitarian character of modern diplomacy one may be permitted to regret this imprudence, even when it testifies to the chivalrous spirit of those who have committed it. >/

The two litigant states each put forward a serious complaint. Italy complained that a violation of right and justice had been committed to the detriment of an Italian subject who had been illegally arrested and whose goods had been confiscated by administrative process ; Columbia on her part demanded reparation for the double wrong which she had suffered.

2 It may be admitted provisionally that the two charges had an equal foundation. Each of the two cabinets was accordingly bound not to admit the redress of the grievance formulated against it so long as it failed to

obtain satisfaction with regard to its own complaint. And it was necessary to adhere to the always advantageous tactics of *do ut des*. Each party, open to attack on one point, was obliged at least to avail itself of its advantages on another. Compensation was no guarantee of success, but at least it prevented defeat from being transformed into disaster.

This attitude, the advantages of which were so evident that it seemed impossible that a government should ever have thought of abandoning it, was not maintained with sufficient firmness by Colombia; this state demanded that the incident of Bonaventura should be submitted to arbitration at the same time as the Cerruti question; Italy resisted the appointment of any commission of arbitration to deal with the Cerruti affair. At last a so-called compromise was agreed upon, but it was in reality a convention in which Colombia ran all the risks. On May 24th 1886 the Italian ambassador at Paris, Count Menabrea, and the minister plenipotentiary of Colombia in the same city, M^r Mateus, signed two *separate* conventions; by the terms of the first (1) before signing the protocol relative to the adjustment of the other questions pending between the governments,

(1) This first arrangement took the form of two identical notes, addressed to each other by the two ministers on the same day. This form is preferred by diplomatic usage for all the conventions in which one of the parties begins by formulating a one-sided declaration. *Official publication*, p. 158 and 159.

it is declared on the one hand that any act inconsistent with the treaties in force and the territorial sovereignty of Columbia, should be considered as altogether contrary to the orders and intentions of the government of the King of Italy.

« On the other hand, the Colombian government declares its full confidence in the uprightness of the King's government for the decision that may be rendered by the competent authorities of Italy regarding the acts of Captain Cobiañchi. » In accordance with the regulations in force, that officer should furnish to the Superior Naval Council all information concerning his cruise while commanding the *Flavio Gioia*.

The King's government agrees, conformably to the request of Colombia, to lay also before said court the documents which form the basis of the Republic's complaints against that officer of our navy.

The same day the two diplomatic agents signed a « protocol determining a basis for the adjustment of the Cerruti claim ». The following is a summary of this Convention.

The governments of Italy and Columbia, after adjusting by an exchange of diplomatic notes the questions pending between them which are not submitted to the friendly mediation offered by the government of His Catholic Majesty, and desiring as far as other questions are concerned to fix in a clear, precise, and posi-

tive manner the bases of the said mediation, have signed *ad referendum* the present protocol :

Art. 1. — Immediately after the approval of this protocol the government of Republic of Colombia shall restore to the Italian subject, Mr Cerruti, or to his representatives, the real estate belonging to him situated in the territory of said Republic, which was seized by the authorities of the State of Cauca, or by any other authorities of the Colombian nation, during the last civil war.

Art. 2. — Every other claim whatsoever actually pending between the two governments, in the behalf of said Cerruti or of other Italian subjects, remains subject to the mediation of the government of His Catholic Majesty before which the two governments shall produce their respective proofs and documents.

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The principal questions to be decided by the mediator are as follows :

Did the said Cerruti or any other Italian subjects lose in Columbia these conditions of neutral aliens. Yes or no ?

Did they lose the rights, prerogatives and privileges granted to aliens by *ordinary law* and the laws of Columbia ? Yes or no ?

Must Colombia pay an indemnity to the said Cerruti, or to any other Italian subjects ? Yes or no ?

Should it result from said mediation that Colombia must pay indemnities, the amount of these indemnities, as well as the manner, terms and guaranties of payment

shall form the object of an arbitral judgment, without any appeal or reservation whatsoever, which the two governments agree, from this date, to defer to a mixed commission, to be composed of the following members : The representative of Italy at Bogota, a delegate of the Colombian government and the representative of Spain at Bogota. The work of the mixed commission shall terminate within six (1) months after notification given by the Spanish government of its conclusions to the representatives of the two parties at Madrid.

Article 4 contains an amnesty clause in favour of Mr Cerruti.

Article 5 provides that « diplomatic and friendly relations shall be resumed on the day that the present protocol receives the approval of the two governments. »

These two separate conventions destroyed, to the detriment of Columbia, the equality of the situation which, before their signature, resulted from the circumstances.

On one point, Italy was both judge and one of the parties in her own case and without casting any suspicion, in any way whatever, on the honesty of the members of the Superior Naval Council, one may say that this advantage was considerable. In all disputes where the national *amour propre* is concerned, it is a

(1) This term was extended to eleven months by an additional article signed August 23th 1886.

precious privilege for a defendant to be tried by his compatriots and this privilege is still more valuable when the judges are his peers and colleagues. Moreover it is no outrage on the members of this superior council to suppose that the minds of the honorable officers who belonged to it were specially accessible to the influence of ardent patriotic sentiment. In the ordinary exercise of their profession this sentiment is a source of strength, but it may well be doubted whether it assisted them to weigh with due serenity the acts which were the subject of complaint against commander Cobianchi.

However that may be, *it does not appear that any penalty was pronounced against this officer, nor even that he received any reprimand, and the decision of the tribunal was never officially communicated to the Columbian government.*

On the contrary the claim proffered by the Italian government in the interests of M^r Cerruti was to be submitted to the judgment of a third power, and it is incontestable that this tribunal, before which each party would be able to exhibit the grounds on which it relied for attack and defence, presented much greater guarantees of impartiality.

May we be allowed to say that the Columbian government did not perhaps perfectly realize at the outset the gravity of the clauses of the protocol of Paris, and that above all the Columbian diplomatists, who afterwards gave their attention to the Cerruti claim, did not

appreciate with perfect exactitude the consequences of these clauses?

Construing articles 2 and 3 of the protocol together, the manifest result is that Columbia recognized that *if it was decided that M^r Cerruti had preserved his character of neutral alien and was entitled to an indemnity, this indemnity should be fixed by an international tribunal of arbitration, and not by the ordinary Columbian courts.*

Now it must be pointed out that this concession was derogatory in a high degree to the ordinary law, and was likewise derogatory to the most incontestable principles of the law of nations : Since in no case have aliens the right to claim privileges and advantages which would not be granted to the native inhabitants, they must, although victims of an illegal act committed to their detriment by an official, follow the same procedure as that which would be followed by a native inhabitant, that is to say they must address themselves to the ordinary courts.

If the plaintiff by this means fails to obtain redress of the grievances of which he complains, then if he is an alien he may obtain the intervention of his government on the ground that the law of nations has been violated in his person.

But this very reason shows that the alien cannot claim to reverse this order : since the right of the government of his own country to intervene diploma-

tically results, not from the original injury which its subject has suffered, but from a denial of justice which has prevented its reparation, or has been the cause of the insufficiency of the reparation, it follows that diplomatic interference is only legitimate after all the ordinary means of redress provided by the laws of the country have been tried.

Any other procedure is not only irregular, but *theoretically inconceivable*, since the law of nations is not violated when an alien suffers unlawful injury, and the violation only begins at the moment when the reparation of the wrong is refused (1).

Columbia therefore made a very important concession to Italy : it is probable that she had reason to do so (2);

(1) This doctrine is universally admitted by juriconsults of all nations.

« The government » says Pasquale Fiore « which, with a view to protecting the interests of its subjects, seeks to substitute diplomatic action for local jurisdiction, commits an act derogatory to the right of international sovereignty » *Treatise on International Law*, § 626.

« The state » writes Sir Arthur Phillimore (2. *International Law*, § 4) « must be convinced that its citizens have exhausted the legal means of reparation offered it by the tribunals of the country where they have suffered the injury : if these tribunals are powerless or unwilling to hear their complaints and decide upon their value, then there is perfectly good ground for intervention. »

Lastly Cushing expresses the same opinion in paragraph 241 of his work : « the rule » he says « is that before a citizen of a country has a right to the support of his government in order to obtain reparation for the injury that he has sustained by the act of another government, he must have demanded this reparation in vain from the tribunals of the power which has caused the injury. »

2/ (2) Otherwise indeed, Mr Cerruti would have been obliged to lay his complaint before the tribunals of the department of Cauca ;

besides she hoped that the arbitrator would form the same judgment as herself of the political part played by Mr Cerruti, and would consequently hold that the latter had lost the right to be considered as an alien.

Be that as it may, the signature of the protocol of Paris was an incontestable diplomatic success for Italy ; nevertheless it aroused keen dissatisfaction on the part of Mr Cerruti.

The latter left no stone unturned to prevent the ratification of the protocol, and failing to obtain this result, he published on December 11th 1886 « *documents submitted to Parliament and to public opinion* ». This was « the *Green Book* of Mr Cerruti » in reply to the official *Green Book* that the Italian minister for Foreign Affairs had just issued.

In the preface to this work, Mr Cerruti accused M. de Robilant of weakness and negligence, and he declared that « this publication was intended to complete, to correct and, in case of need, to refute the documents published by the minister in his *Green Book*..... It was necessary that public opinion and Parliament should be enlightened as to the manner in which his hope of protection had been realized, and, after a parliamentary enquiry, a million Italians settled all over the world will know whether they still have a country (1). »

now, after the events of 1885, this jurisdiction was not above suspicion.

(1) In a letter to a friend dated August 31st 1886 Mr Cerruti

What then was the cause of this irritation on the part of M^r Cerruti? It is indispensable that we should know it, and we shall see later that from the beginning all his efforts were directed to a special end, which he never ceased to pursue tenaciously. Apart from the confiscation of the estate at Salento, a vast agricultural property (*hacienda*) of 6250 hectares, of which M^r Cerruti wrongly claimed to be owner, and which he estimated to be worth, with its implements and live-stock, 226,377 piastres, this Italian merchant contended that his fortune had suffered seriously by the confiscations pronounced against the Firm of E. Cerruti and C^o, of which he was at the same time the most active partner and the manager; now it has been legally established, by experts chosen by the two governments, that the affairs of this firm were far from being as prosperous as he asserted: it was necessary therefore to avoid, at all costs, either a restitution in kind, or an examination of the accounts (1).

Article 1 provided for the immediate restitution of the landed property, but M^r Cerruti would not re-enter into possession. For eight months, the government of Columbia had offered to M^r Cerruti, his wife, his

wrote: « Tell me after all these acts, if you can, whether I am wrong to regard the Italian authorities as accomplices of the Columbian government ». Document published by M^r Cerruti, p. 81.

(1) On the real state of the private affairs of M^r Cerruti, and the affairs of the firm, E. Cerruti and C^o, *vide infra*, Appendix.

partners, his friends and the Italian Consul to restore the property at Salento, but none of these persons would accept it. M. Cerruti has himself explained the reason of his refusal, and the end at which he aimed in a long letter addressed on August 8th 1886 to the Italian Minister of foreign affairs, several passages of which have a special interest (1).

As to the supplementary indemnities for depreciation of the restored estates and the loss of movable property M^r Cerruti rejected them not less energetically, for they

(1) « The undersigned respectfully calls the attention of your Excellency to the fact that the Columbian government has over and over again offered to restore to him the confiscated properties. This offer (long known to the government of the King thanks to the official documents which have been forwarded) should have been sufficient in itself to awaken the suspicions of the said royal government and to prevent it from accepting any arrangement which sanctioned the offer. The landed estate that Columbian government proposes to restore no longer exists in reality, because pillage and neglect have made it return in part to the state of nature, and it is in part occupied by others, so that to reenter into possession of it would be a long, a difficult and a dangerous operation. Doubtless, it will be said that in determining its value, these elements of depreciation will be taken into account, and that the indemnity contemplated by another clause of the compromise will necessarily be augmented in proportion. But the answer to this is that *such an arrangement would necessarily lead to an inextricable labyrinth of discussion, and that is precisely what the Columbian government desires.* There is only one way of avoiding this : it is for Columbia to keep the property of which she has usurped possession, and to sell it by auction on her own account, reimbursing to the owner a sum equal to its value before it was pillaged » Letter of M^r Ernesto Cerruti to the Italian Minister of Foreign Affairs. Rome August 8th 1886. It will be seen later that this last sentence was prophetic.

entail, in order to enable one to fix their amount, a minute and attentive examination of the account and business books of the firm of E. Cerruti and C^o. What he demanded was an indemnity in a lump sum arbitrarily determined ; as the business of the firm of which he was the manager was not as prosperous as he alleged it to be, he thus increased his chances of getting a large indemnity.

Despite the ardent opposition of M^r Cerruti, the protocol of Paris having been ratified, the Spanish government addressed itself to the task which it had consented to fulfil.

In appearance two questions were submitted to the mediator : he was asked to say, firstly, whether M^r Cerruti had, by reason of his acts, forfeited the right, in his relations with the Columbian government, to screen himself behind his condition as an alien (art. 2 and 3 of the protocol), and, secondly, whether M^r Cerruti was entitled to an indemnity (art. 4). These two questions were not of equal importance, or rather the second had only been submitted by inadvertence. It had already been twice determined, by article 1 of the protocol and by the previous decision of the Columbian government which, so early as the month of April 1885, formally expressed its will to restore confiscated property *to all, both natives and foreigners*. It mattered little, so far as this first point was concerned, whether M^r Cerruti was an Italian or a Columbian, since, according to any hypothesis, the government was firmly

resolved to restore his goods to him and pay him an indemnity. Besides, as the Spanish mediator afterwards pointed out, the right to restitution of the moveable goods and to an indemnity was implicitly recognised by article 1.

On the contrary, the question submitted in articles 2 and 3, although destitute, as has been seen, of all pecuniary interest, was very important and it presented a doctrinal interest which the Columbian diplomatists had perfectly understood. A state, which reckons among its inhabitants numerous emigrants whom their nationality connects with governments possessing powerful armies and fleets, always sees with much uneasiness foreign diplomacy interfere to support a claim made by such an emigrant ; it feels immediately that its national independence may be menaced, if it permits the establishment of a precedent that other aliens will not fail to invoke afterwards. Columbia then had reason to attach great importance to the solution of the question submitted : is M^r Cerruti or is he not an Italian subject ? For this question, *by reason of the clauses of the protocol of Paris*, was equivalent to another, namely : has Italian diplomacy or has it not the right to intervene in order to judge whether the satisfaction offered to M^r Cerruti is sufficient. About this sole question of principle and the consequences involved in an affirmative response will gravitate all the incidents which will be studied in these pages.

During the mediation proceedings the Columbian

government, which seemed decidedly to have forgotten throughout the Cerruti case that entire straightforwardness and absolute honesty are insufficient to guarantee the success of a suitor, inasmuch as the judge can only know the truth through the proofs brought before him, made a mistake in tactics. In order to establish the participation of Mr Cerruti in the political struggles of Columbia, it was not sufficient to produce at the hearing of the case the depositions obtained at the time of the insurrection, which had not been made before magistrates of the judiciary order, nor to ask that the testimony should be taken at Madrid of some witnesses then residing in Europe. Such testimony deserved little credit, and Mr Jimenez, Mr Cerruti's advocate, might easily oppose to it letters and depositions favourable to his own client. The Columbian government observing the effect produced thought to repair its error by sending to the towns of Cauca an advocate of Bogota with instructions to conduct on the spot an impartial enquiry, but the report of this enquiry arrived too late at Madrid, and was not taken into account by the mediator, and even if it had been possible for the results of the enquiry to be communicated early enough to be of use, it is evident that they would not have modified the opinion of the mediator, since the enquiry was vitiated in its essence. A litigant is never qualified to direct such proceedings : witnesses can always be found to give evidence tending in a particular direction, especially when political passions are

active, and the judge can never feel assured that the same vigilance has been exercised in eliciting and impartially recording testimony of a contrary character (1).

Columbia then had failed to fulfil the first duty of a litigant, which consists in the production in due form of a proof worthy of credit. Under these conditions, the mediator, who also had under his eyes the compromising note addressed on July 29th 1885 by Mr Restrepo to the Secretary of the State of Cauca, was obliged to admit the complaint of the Italian government, since *foreigners are always presumed to have remained neutral amid the political struggles that divide the country in which they reside* (2). On the 26th of January 1888, he formulated a proposition of mediation which was unfavourable to Columbia, and of which the following is a summary :

After tracing the biography of Mr Cerruti and relating

(1) The Colombian government ought, taking its stand on the precise terms of article 2 of the protocol : « the two governments will produce their respective proofs and documents », to have applied for a Spanish magistrate to be sent to Columbia for the purpose of making the indispensable inquiry on the spot. It is probable that this application would have been granted by the mediator : moreover I would add that this point ought to have been the subject of a special clause of the protocol. The circumstances under which proofs are produced constitute an element of high importance in cases of litigation : why then are they so often left unregulated in protocols of mediation or arbitration.

(2) The mediator, who thought it his duty to reject the testimony presented by the two parties did not indeed decide that Mr Cerruti had not committed the acts complained of by the Colombian government, but that this power had not adduced proof that these acts had been committed. This distinction is important.

the facts and incidents of the affair in dispute, the mediator analyses at length the note of Mr Restrepo to the Secretary of the State of Cauca, dated July 29th 1885. Then, after setting forth various legal considerations, one of which, in view of its importance, will further on be the object of a special examination, he decides, in reply to the first two questions, that: « Cerruti has not forfeited his character of neutral alien in Columbia nor the rights, prerogatives, and privileges granted to foreigners by the customs and laws of Columbia. » « If the acts attributed to Cerruti were true, » he added, « and if the government of Colombia took the precaution at the time they were committed to secure positive evidence to that effect, there is no doubt that his condition of alien would not have prevented his expulsion from the country with all the consequences that the laws of the country and treaties in force between Italy and Colombia imposed upon him. In the present case the mediator is of the same opinion as the national government of Columbia, that in the procedure begun by the government of Cauca there is no sufficient evidence of Cerruti's alleged participation in the civil war. »

Consequently the payment of an indemnity will be due to Mr Cerruti « for all the movable goods which cannot be restored in kind and for the damage done to his estates (1). »

(1) The mediator, in concluding, considered that it was his duty to declare that « the doctrine laid down by the general authori-

This decision was not an arbitration award but a proposal of mediation; the two parties could therefore reject it, but as was natural they immediately resolved to accept it.

The conclusion in favour of the payment of an indemnity by Columbia was of little importance. As the mediator has very justly observed, it was the necessary consequence of the instructions previously given by the federal authority of Columbia, and, above all, article 1 of the protocol. As soon as the two parties recognised that according to Columbian law the confiscation of the landed property had been illegitimate, how was it possible to defend the confiscation of the movable goods (1)? On the contrary, we shall see directly how difficult it was to come to an understanding on the import to be given to the answer to the first two questions.

In conformity with the provisions of the protocol of Paris an arbitration commission of three members assembled at Bogota on September 5th 1888 (2). Several

ties of Columbia is in harmony with all the prescriptions of international law, and show that in the midst of troubles and difficulties that disturb the sovereign states of the confederation, the central government maintained intact these principles of justice and of international law which entitle it to the consideration of other countries, and favor the development of friendly relations with other nations. »

(1) It appears that article 4 of the protocol formulated a question implicitly resolved by article 1.

(2) Count Gloria represented Italy, Mr Julian Cock Bayer was the Columbian delegate, and Mr Bernardo de Cologan had been nomi-

months elapsed before M^r Cerruti formulated his claim in due form. Three times the Columbian delegate, guessing the tactics of the claimant, urged that a term should be fixed for the presentation of the claim. In the end all that he was able to obtain, (December 3th) was that Count Gloria should send to his government the following telegram : « The majority of the commission insists on a prompt presentation of the Cerruti claim » (1). At length M^r Cerruti himself arrived at Bogota, accompanied by his advocate M^r Martos Jimenez (January 13th 1889), two months and five days before the expiration of the term which would put an end to the power of jurisdiction with which the commission was invested.

Just three days later, M^r Galindo, the Columbian advocate, presented a long statement (2) in which he as-

nated by the Spanish government : the last of these gentlemen presided. — It will be remembered that the duration of the powers of the commission of arbitration had been fixed at eleven months and this term began on April 23th 1888, the date at which the two governments had notified their acceptance of the decision. More than four months had already elapsed before the day on which the commission of arbitration met for the first time. It would have been preferable to fix a preliminary term during which the commission should have assembled and another in which it should have given its decision (and even on this point a special difficulty might have arisen. *Vide infra*). The second term should only have been reckoned from the day of the first meeting.

(1) The somewhat inaccurate wording of this telegram deserves notice : why did Count Gloria make a distinction between the majority of the commission and the commission itself?

(2) This statement occupied twenty five pages of a quarto volume ; its extent is such that it is impossible to see anything

ked for the regulation of certain preliminary questions. He demanded first of all that the commission of arbitration should, before deciding the issue, give a judgment recognising that it was incompetent to determine the indemnities which might be due to the firm of E. Cerruti and C^o, a Columbian personality in the eyes of the law, and « *any decision which the commission might give on this matter would exceed its power and would remain subject to the diplomatic action of the Colombian government* ».

Then continuing his conclusions, Mr Galindo demanded that « the tribunal should give judgment in the same manner as a judge, according to the principles of international law and repudiating the role of a friendly medium, should not consider itself authorized to impose upon Colombia the payment of a lump sum as indemnity, through an amicable adjustment. *I have been positively instructed by the party I represent to declare that the terms of the obligation did not authorize such a sentence, and that the Colombian government will not accept it.* »

Lastly the author of the statement, after examining various points of law relative to the obligations of states towards aliens, terminated by asking the commission to declare what it intended to do supposing the plaintiff presented his claim at so late a date that the

except a coincidence between the date when it was laid before the commission and that of the arrival of Mr Cerruti at Bogota.

defendant had no longer time to take the necessary measures for the defence of his rights (1).

(1) The following is the passage of the statement relating to this subject: « My government has given me instructions to protest against the refusal of the majority of the tribunal to grant the application of the Columbian delegate that the rules of the procedure should be fixed in this affair. As the protocol of Paris did not determine any such rules, it devolved upon this tribunal to fix the procedure, the more so *as there can be no judgment* without procedure.

« In order to show the inconveniences of this refusal, let us suppose -- a supposition which is perfectly admissible -- that Mr Cerruti, who in this litigation is the complainant, should wait until the last day but one of the term fixed by the protocol (which expires on the 23rd of next March) before presenting his claim. Would the commission be able in twenty-four hours to transmit the claim, receive the proofs, give the defendant a time within which to reply, and lastly pass judgment, in a word, would it be possible to accomplish all the different acts of procedure which belong by natural right to all suits, and without which the sentence is tainted with nullity ?

« Evidently not.

« It would not even be regular to present the demand a week, a month, or even two months before the expiration of the term. Now the term of eleven months allowed to the commission for deciding the case began on April 22nd 1888, and the proceedings ought to have commenced the same day.

« The Columbian government has the absolute right to know what the claim is, *within a reasonable time, and it does not yet know what it is*, after the lapse of 270 days, and yet the entire term in which the sentence ought to be given is 330 days ; I am instructed by the party I represent, the only one to whom this delay is detrimental, to formulate on this subject the most express reserve.

« If there were proofs to be produced and it were materially impossible to produce them within the time which remains, how would it be possible to obtain a prolongation of the term ? Accordingly I respectfully ask the tribunal to be so good as to make

This statement called forth protests from the Italian commissioner who complained that it dealt a blow at the independence of the commission, a blow which was the more serious as it appeared to have a semi-official character.

7/ All international juriconsults agree in pointing out the importance of the choice of the place where an arbitration tribunal is to sit. The protocol of Paris had chosen Bogota, which was the most suitable place to enable the commission, with a due knowledge of the matter, to fix the amount of the indemnity. But on the other hand Bogota, [^]the capital of the country, ₂ which was the defendant in the case, was for that very reason the place where there was the strongest manifestation of the passions which are invariably aroused by a dispute in which the national *amour propre* is at stake.

In these circumstances the Columbian government ought to have redoubled its vigilance in order to ensure that the attitude of all those who represented it in the Cerruti litigation should be scrupulously correct. Now the general tone of Mr Galindo's statement was far from

some declaration on this subject in order that the parties may know what line of conduct to follow, what formalities to observe, what means to take for the defence of their rights.

• Pray, gentlemen, accept the assurance of my personal consideration.

« ANIBAL GALINDO ».

being as respectful as it ought to have been and the learned advocate seemed to forget how delicate was the situation of the party that he represented (1).

The Italian commissioner Count Gloria asked for explanations from M^r Restrepo, the Minister for Foreign Affairs, with respect to certain passages of the statement, and whilst awaiting the answer he notified on January 25th his withdrawal from the commission. M^r Restrepo replied that he never had any intention of reducing the powers of the committee to narrower limits than those contained in the protocol of Paris,

(1) Besides the final formula of salutation (*Vide supra*. p. 50, note) there were many passages which might be considered out of place in this statement. I give only two extracts: « The question is to know whether European states wish to apply to us the principles of international law which they observe in their relations with one another, or whether they wish to invent for our use a legislation which would occupy a middle position between international European law and the principles of exterritoriality which they apply to Mohammedan countries and the savage tribes of Africa ». *Official publication*, p. 247.

Moreover the author speaks of the « barbarism which under the form of the most abject ignorance, of monstrous popular superstition, of criminal and perverse instincts, and of political passions, is always to be found in the lower strata of every community, and from which the governments of Russia, England, France, Italy, Germany and the powerful Republic of North America cannot boast that they always screen individuals. ». *Eod op.*, p. 257. M^r Galindo committed further professional faults that it is difficult to understand. Thus this statement was printed before presentation to the tribunal; and one evening the Italian commissioner received a copy of it, without knowing who had sent it. Moreover at the moment when he received it, other copies were already in circulation.

and Mr Galindo presented an amending statement in which he withdrew the two phrases which had awakened the legitimate susceptibility of the Italian commissioner. Accordingly on the 11th of February, Count Gloria resumed upon the commission the place which he ought never to have left (1).

The author of these pages considers himself all the more justified in criticizing the conduct of the Italian delegate since the attitude of that commissioner has already been judged by an eminent publicist, Mr Auguste Pierantoni, a senator of the kingdom of Italy and a member of the Institute of International Law.

(1) The absence of Count Gloria, if it had persisted, would have raised a delicate question, namely whether the arbitration tribunal could continue to sit. Mr Calvo is of opinion that one's duty, in case of the refusal of one or several arbitrators to take part in the deliberations, is to provide for the filling up of their places, and in case of impossibility to dissolve the arbitration tribunal (*the Theory and Practice of International Law*, vol. III, § 1.768). On the contrary, article 21 of the regulations voted by the Institute of International Law decides that the majority suffices for any sentence, even in this hypothesis, and this opinion is approved by Mr Merignhac in his *Treatise on International Arbitration*, (§ 280). — The honourable president of the commission of Bogota, Mr Cologan, expressed the opinion that the departure of the Italian delegate did not permit the commission to continue its sittings. The contrary opinion seems preferable, but it must be admitted that the question is particularly embarrassing when an arbitration tribunal only consists of three members. In any case one must not, like Mr Galindo, allege the precedent of the celebrated sentence of Geneva; Sir George Cockburn only refused to « adhere to the decision » and to sign it, but he had taken part in all the deliberations: under these conditions, the validity of the sentence could not be doubtful.

2
2/ The conduct of the Italian arbitrator, in leaving the Commission, says this jurisconsult was not correct.

The procedure of arbitration only recognises the unfitness or the regular refusal to serve as an arbitrator. The exceptions based on unfitness and the grounds of refusal must be submitted before any other plea ; but the acceptance of the office of arbitrator, binds the person appointed to fulfil his duties. (*Article 5, paragraph 10 of the regulations for procedure in international arbitration, adopted by the Institute of international Law August 23rd 1875.*) An arbitrator may resign office after having accepted it ; and in this case the parties must come to an agreement on the choice of another arbitrator. But to sever oneself from the commission in order to make protests and then to rejoin it is not a correct proceeding.

This language deserves entire approval. What would become of the procedure of arbitration if a member of the tribunal, taking advantage of impropriety in the language of an advocate, had the right to withdraw. Is not the tribunal instituted precisely for the purpose of supremely judging the conclusions laid before it, and is the caprice of a suitor sufficient to prove the partiality of the judges ?

Mr Martos Jiminez, the advocate of Mr Cerruti, cleverly availed himself of this incident. Taking advantage of the dissatisfaction of Count Gloria, he had forwarded on January 26th through the intermediary of this commissioner to the Italian minister for foreign affairs a telegram couched in these terms : « Convinced that the commission would sacrifice Cerruti ; advise withdrawal ». On February 10th, he presented his conclusions, in which he declared, in the name of Mr E. Cerruti, that « taking his stand on the grounds pre-

viously set forth and on any others, which he reserved the right of submitting to the proper quarter, he considered himself henceforth outside the pending suit and withdrew his claim. »

On February 18th, Mr Jimenez again submitted his conclusions, begging the judges of the arbitration court « to consider that Mr E. Cerruti was formally outside the suit, in order that no decision, no decree, no sentence *unanimously pronounced* (1) (which on any hypothesis would have no legal value) might prejudice a subsequent claim or his rights; he would wait until the Italian government, who are the plaintiffs in this suit, take such a decision as they think good, after receiving the communications that the undersigned advocate shall judge proper to submit to them (2).

These conclusions were laid « with the most profound respect before the judges of the tribunal of arbitration in order that they might have such effect and weight as were due ».

The next day Mr Cologan, the President of the Commission, advised Mr Galindo of the withdrawal of the

(1) These words should be compared with the similar expressions of Count Gloria, dated december 3rd: the commission and the majority of the commission are continually placed in opposition and it is pretended that unanimity is necessary to make the decision valid. This strange doctrine cannot be resisted with too much firmness; it would put the validity of every arbitration award at the discretion of a single delegate.

(2) *Official publication*, p. 304.

claim of Mr Cerruti and expressed the opinion that this withdrawal took the affair out of the hands of the commission. On Feb. 23rd, Mr Galindo replied by a letter addressed to the president of the mixed commission; he demanded that judgment should be pronounced by default (1).

u/ At length, on March 2nd 1889, the commission unanimously decided « that it suspended its sittings, because it no longer had before it the affair which rendered them necessary ».

This was the last act of the Italo-Columbian mixed commission; the term of its jurisdiction expired on March 23rd and the Cerruti claim remained in abeyance with some additional complications.

With reference to this strange result three questions require to be examined. Firstly was the arbitration commission of Bogota right in separating without giving any judgment whatever? On this first point no doubt is possible, the commission maintained the only attitude which was compatible with the principles of law, for *at no moment had it been put in possession of a regular claim of any kind*. After the withdrawal of Mr Cerruti, Mr Galindo applied for judgment to be given by default, but this application, formulated by a simple letter to the president, was not transmitted

s/

(1) *Op. cit.*, p. 313.

according to the regular forms of procedure necessary to put the tribunal under the necessity of giving a decision (1); in reality the tribunal had no one under its jurisdiction, since Mr Cerruti had expressly withdrawn from the suit and Mr Galindo, the Columbian advocate, instead of accomplishing the regular acts of procedure, of addressing applications to the tribunal and of giving the necessary notifications to his adversary, had confined himself to corresponding officiously with the President (2).

If the conduct of the mixed commission of Bogota was in conformity with the principles of law, it seems on the contrary impossible not to blame the tactics pursued by the advocate who represented Columbia : in a general way Mr Galindo may — apart from the errors of language already noticed — be found fault with for not having given to his proceedings the regular form required by the laws of procedure.

If he had submitted to the tribunal conclusions in due form and if he had transmitted all the information to it in reasonable time, the commission would have been obliged to give judgment, for the strictest obli-

(1) In this sense see the letter of Mr Cologan to Mr Galindo, dated February 19th 1889, section V. *Official Publication*, p. 310.

(2) However on January 21st, Mr Galindo presented conclusions in due form, but the tribunal could not decide preliminary questions, since it had not been put in possession of the principal issue.

gation of the judge is to formulate his decision on questions submitted in a legal form.

Undoubtedly Mr Cerruti had the adroitness to present his claim late, so as not to leave his adversary time to produce his proofs. But this very manœuvre would have been easily baffled by an experienced tactician. When in order to decide a dispute which has been the occasion of violent measures and the cause of the rupture of diplomatic relations, two governments have, after laborious negotiations, signed a protocol of mediation and the advice of the mediator has been ratified, it is inadmissible that the illwill of a simple private person should be allowed to arrest the normal course of the proceedings. If Mr Galindo had laid these matters in due form before the mixed commission, his contention would have been irrefutable, and no juriconsult will believe that the Italo-Columbian Commission would have refused to admit it. In civil law, the internal laws of each country give every litigant engaged in a suit the right and the means of arriving at a definitive solution despite the default or withdrawal from the suit of his adversary. It is indeed intolerable that a private person should be liable to be harassed by applications unceasingly renewed and never leading to a judgment. 2/

Article 403 of the French Code of Civil Procedure attests implicitly that a withdrawal of suit is only effective, in reference to the defendant, in so far as the

latter has acquiesced in the act of his adversary. If the defendant does not accept the withdrawal he has the right to demand from the tribunal that the case shall take its course and be completely investigated; judgment will be given and the only resources remaining to the defendant will be opposition and appeal.

If this principle is true in ordinary suits, how much more faithfully it ought to be observed in international disputes where such considerable interests are at stake, Although Mr Cerrutti did not appear before the Commission of Bogota and did not present his claim, the Columbian government was entitled to demand that judgment should be given, since in reality the engagement of the affair dated from the 24th of May 1886, when the protocol of Paris was signed. The withdrawal notified by Mr Jimenez could not stop the course of the proceedings since the learned advocate took good care to intimate that he reserved the right of his client, and merely abandoned the suit; under these conditions, Columbia could and ought to have insisted that the indemnity claimed should be definitively fixed.

Moreover it is scarcely necessary to add that the responsibility for the failure of the Italo-Columbian Commission rests entirely on Mr Cerruti. The latter has alleged that the impropriety of Mr Galindo's attitude had prevented him from remaining in the case, and he has also contended that the publication of Mr Pizarro's book, by exciting popular passion, made it impossible for

him to stay at Bogota, whilst the liberty of the commission was at the same time trampled (1). But these excuses cannot be accepted, for when the Galindo incident occurred, the commission, which had already been sitting for four months and a half, had not yet been put in possession of Mr Cerruti's claim. The true reason of the withdrawal of the latter is apparent : He did not wish at any price to submit to any tribunal whatever the examination of the accounts of the Firm of E. Cerruti and C^o and he desired to obtain by diplomatic agency the allocation of a lump sum. According to the expression in his telegram, he feared to be sacrificed by the commission, and his fears were not without foundation, if it is true that one sacrifices a litigant by refusing to grant him damages except on specific proof of the injury sustained and of the extent of this injury : the three arbitrators of Bogota were indeed too good juriconsults to judge otherwise than on proofs and documents worthy of credit.

(1) Mr Pizarro was the advocate of Bogota whom the Columbian government, at the time of the mediation of Spain, had instructed to make on the spot, in Cauca, an enquiry into the doings of Mr Cerruti. This advocate, displeased to see that his work had been in vain since the depositions reached Madrid too late, thought it a skilful manœuvre to publish a book on the Cerruti case. This contribution to jingo controversy ought not to have been published before the definitive settlement of the dispute, and the Columbian government disapproved of its publication : but the incident had no connection with the labours of the Commission of Bogota.

Lastly a third question remains to be solved. What was the legal situation resulting for the two governments of Italy and Columbia from the stoppage of the labours of the mixed Commission? It seems that the situation was this : The two governments had engaged themselves by contract to appoint an arbitration commission to fix the indemnity due to an aggrieved Italian subject.

By the fault of the latter the tribunal had not given judgment; each of the two states had the right to consider that the litigation had received its solution, since, in reference to a person who has prevented the accomplishment of an event, the innocent parties to the affair are justified in considering this event as having happened.

Perhaps Mr Cerruti had still the right to address himself to the Columbian tribunals (1), but in any case it seemed that Italy would cease to support by diplomatic action the claim of her subject.

We shall see that it was not so.

(1) The question is doubtful, for it is not certain that the protocol of Paris, in instituting a special tribunal, had not terminated the competence of the ordinary tribunals. However the contrary opinion seems preferable.

III

As early as December 21st 1889, M. Damiani, under-secretary of state at the ministry for foreign affairs at Rome addressed to general Posada, Minister-plenipotentiary of Columbia in the same city, a memorandum in which he retraced « the various incidents which must have convinced M^r Cerruti that the commission of Bogota would have acted in tainted hostile atmosphere », and in which he contended that these incidents « were the true cause of his sudden departure from Bogota and of the abandonment of the arbitration ».

But « as the King's government cannot, naturally, in any wise tolerate that an Italian citizen should be unjustly despoiled of his property, be subjected to arbitrary arrests and assaults, and no attention should be paid to his claim, although supported by the diplomatic action of the royal representatives, it is absolutely necessary to find another method for the settlement of this question » (1). Before opening fresh negotiations, M^r Damiani thought it opportune to fix

(1) *Official Publication*, p. 454.

ten points on which accord seemed to him to be necessary.

At the outset the Columbian diplomatic agent urged strongly that the Cerruti claim had come to an end with the commission of Bogota. But after some time he consented again to discuss the Cerruti question. It would be useless and wearisome to review here all the correspondence which was exchanged from December 20th 1889 to August 18th 1894, the date of the signature of the protocol of Castellamare : this correspondence fills nearly 200 pages of a quarto volume.

Only one question divided the diplomatists ; it concerned, it is true, the most delicate point of the Cerruti claim, already so fertile in discussions : the question was whether the injury, caused to Mr Cerruti by reason of the confiscation of the possessions of the firm of E. Cerruti and C^o, gave ground for a diplomatic claim and eventually for a decision by an international tribunal (1). Was it necessary on the contrary to consider that any litigation concerning the affairs of the firm of E. Cerruti and C^o, constituting in the eyes of the law

(1) Columbia had consented to renew the important concession already made at the time of the signature of the Paris protocol, namely that the direct and personal grievances of Mr Cerruti should be submitted to the examination of an international tribunal ; but should the injury done to the Columbian firm of E. Cerruti and C^o have been considered as giving ground for a personal complaint on the part of Mr Cerruti ? That was the contentious question.

a Columbian personality, could only be laid before the Columbian tribunals, and that the South American Republic could not admit another solution, incompatible with its national dignity and its independence?

This question which had not yet been directly dealt with in the diplomatic correspondence, and which the Paris protocol of 1886 had omitted to notice, was in reality the second serious question raised by the Cerruti claim.

The Spanish government had decided that Cerruti had preserved his status as an alien : therefore Italian diplomacy was justified in supporting his claim in case of insufficient restitution. *But had all the elements of Mr Cerruti's claim an international character, and could they give ground for diplomatic negotiations?* That is the point which the Spanish mediator had omitted to settle. This omission had been deliberate, for as the passage, which I am just going to quote, attests, the mediator had clearly discerned that a delicate question had been left in the background, but precisely because it was delicate, he had not thought proper to decide it, since it was not submitted to him.

There still remains, he said, in the preamble of his proposal of mediation, in the case submitted to the mediation of Spain, another point of view of high interest ; it has reference to this fact, that the possessions of Cerruti, which were confiscated, belonged to a commercial association which by its very consti-

tution was invested with Columbian nationality and cannot be considered as a foreign firm.

Indeed whatever may be the nationality of the individuals belonging to a commercial association, this association can only develop and exist in accordance with the legislation of the country in which it has been formed. All the reasons which have led states to admit that a foreigner preserves his nationality, and has a special legal status, disappear when we have to deal with the moral entity called a commercial association (*société commerciale*). If it is a company which is at fault; it alone is responsible; the nationality of its members does not come into the question. But in the present case and for inexplicable reasons, the authorities of Cauca hastened to declare that the interest of the partner Jose Quilici would be respected inasmuch as he had remained neutral. At the same time, and for the opposite reason, the possessions of the partner Cerruti were confiscated although he was admitted to be an alien.

If such doctrines were admitted by international private law, the legislation of a country concerning commercial associations would be thereby annulled, since it would be sufficient for that purpose to introduce an alien upon the managing board of these associations or simply to get an alien to sign a document connected with the firm's affairs. If it were alleged that, at the winding up of the association, the share belonging to foreign partners could be set aside and withdrawn from the obligations incurred by the other partners, it is evident that the winding up could not be carried out, still less carried out according to the legal rules, without the intervention of the partner whose share had been set aside; and the latter invoking his status as an alien would be able to demand and obtain the intervention of his government and thereby completely paralyse the action of the authorities.

It is impossible to introduce, in the relations of one people with another, a principle more dangerous in itself and speaking from a legal point of view, less acceptable; it is then the duty of the mediating government to make with regard to this principle its most formal reserves.

The learned advocate for Columbia also had in his statement of January 21st asked the commission to decide by an interlocutory judgment that every thing which concerned the confiscation of the property of the firm of E. Cerruti and C^o must be considered to be outside the province of the discussion. But by reason of the incidents of which it was the occasion, this statement did not lead to a preliminary finding on this important question and the President of the Commission contented himself with replying that « for the moment it is not advisable to discuss and decide the preliminary questions set forth in the statement, seeing that they form an integral part of the arbitration award, and their presentation is considered inopportune so long as the claim is not yet known ». The difficulty therefore had not been solved, nor even examined when Columbia consented in 1890 to the claim of M^r Cerruti being again taken in hand by diplomacy.

As the question which has been pointed out was the only one which has given rise to a difficult and exhaustive discussion, it is important to set forth the principles of international public law which were to regulate its solution.

This problem has barely been studied by a few publicists. But as far as the most celebrated precedent, which goes back to the year 1865, is concerned, Wharton has preserved for us all the interesting passages of the correspondence exchanged on the occasion (1).

The steamer *Antioquia*, a mail packet belonging to the « *Compania Unida de Navigacion por vapor en el Rio Magdalena* » had been seized in December 1865 on the River Magdalena and requisitioned by the Columbian Government for the needs of war. The owners of the boat were a Columbian limited joint stock company with a nominal capital of 300.000 dollars, of which about 160.000 dollars belonged to American citizens. The American shareholders sought the support of the government of Washington in claiming an indemnity from Columbia. Mr Seward, then secretary of state for foreign affairs, addressed to Mr Burton, the United States Minister in Columbia, a long note in which after *in fact* recognising that the Columbian government had, in the particular case, acted in conformity with the law, he examined *in principle* and in a general manner the doctrine of his fellow countrymen.

« The association, as an entity, is to be assimilated to a citizen of Colombia. If it has sustained a wrong, is it not for it to pursue

(1) *Digest of International Law*. sec. 217.

c/ such remedy, as it may have, in the same manner as a private Columbian would be obliged to do, without the aid of any government external to Colombia ?

It may well be that subjects of Great Britain, France and Russia are stockholders in our national banks. Such persons may own all the shares except a few necessary to qualify the directors whom they select. Is it to be thought that each of those powers shall intervene, when their subjects consider the bank aggrieved by the operations of this Government ? If it were tolerated, suppose England to agree to one mode of adjustment or one measure of damages, while France should insist upon another ; what end is conceivable to the complications that might ensue ?

It is argued that when an American citizen goes abroad and fuses his property or invests his funds in any form of special association created by the law of the region where the association conducts its business, by which the general title to the property with which the company operates is vested in an artificial body, giving to the associates shares assignable at pleasure, in that case the shares of the American citizen are a species of property not partaking of his national character and in respect to whatever may befall the property of the association, the American shareholder has no valid claim to the intervention of his government. If his shares, specifically as the property of an American, in that shape should be the subject of unjustifiable confiscation or other outrage, that would raise what we conceive would be a different question, with which we are not at present concerned (1) .

These words of the learned American Secretary of State for the Department of Foreign Affairs constitute

(1) Wharton. — *Digest of the International Law.*, sec 217.

the most penetrating exposition of the true principles of the law.

When an association is invested with civil personality, the persons of whom it consists disappear in the eyes of the law; the association alone has rights, it alone is the proprietor, it alone is the creditor, and if an unlawful injury is done to it, it can only formulate its claim before the ordinary tribunals of the country : from all points of view its legal life is clearly severed from that of its shareholders or partners; hence the nationality of the latter is of little consequence. 2/

These principles must be applied in administrative as in all other matters and attention must be paid to the fact *that they form a two-edged ~~to~~ eapon*; they are not only an arm in the hands of a government for the rejection of an individual complaint brought by a partner who should protest against the abuses of power of which the association may have been the victim, but they are also an arm in the hands of a partner for the rejection of any pecuniary penalty which might be pronounced against the association by reason of the personal delinquency of one or several partners. 2/ 1/

An association is certainly responsible for the faults and delinquencies of its servants, when the latter, in the ordinary exercise of their functions, have committed a reprehensible act; it is unquestionable for instance that a navigation company is responsible for fouling

due to the negligence of one of its captains, and any joint stock company for an act of fraudulent competition attributed to its manager. But it is manifest that these faults and delinquencies on the part of servants or partners must always be connected with the exercise of the functions entrusted to them; otherwise the pecuniary responsibility of the association ceases, and it would be as illegitimate to admit it in the second case as it was necessary to sanction it in the first. If the manager of an association commits a murder or an act of incendiarism, if he plots against the security of the state or enters into a covenant with the insurgents, these acts may be made the ground of pecuniary penalties, the execution of which may be levied on the private estate and particularly on the shares or interest of the delinquent, but the estate of the association is exempt from all proceedings.

These elementary principles are too well known for there to be any use in dwelling on them, and long ago the Roman Law taught that an action for fraud could not be brought against the *municipia* on account of the fraud of a decurion: it had to be brought against the decurion himself and says Ulpian « the *municipium* will only be liable to be proceeded against, if it is enriched by the fraud of its administrator and in the measure in which it has been so enriched » (1).

(1) Digest, Book IV, Section III, *de Dolo malo*, fr. 15 § 1 :

Let us suppose that a government has violated these principles and that, by reason of the crime of conspiracy or rebellion, rightly or wrongly imputed to one or several of the partners in an association, carrying on business under a collective name, or to shareholders in a limited joint stock company, it has seized the estates, buildings, and movable goods of the association, will this government be justified in contending that the association alone is entitled to take proceedings and that any individual claim by a partner must, without examination, be rejected by a plea of exception? Evidently not, otherwise the government would be enabled to take advantage before the judicial authorities, for the purpose of escaping from the responsibility of its acts, of a distinction deliberately disregarded by its officers at the time when they committed the abuse which is the origin of the complaint. A right of individual action exists then, and when the person who is invested with it is an alien, he can, if he is recognised to be innocent of the crime of which he is accused, ask for the assistance of his government in support of his complaint; the power against which the claim is made cannot reject this intervention on the pretext that it

Sed an in mūicipes de dolo detur actio, dubitatur? Et puto, ex suo quidem dolo non posse dari: quid enim mūicipes dolo facere possunt? Sed si quid ad eos pervenit ex dolo eorum qui res eorum administrant, puto dandam. De dolo autem decurionum in ipsos decuriones dabitur de dolo actio.

cannot tolerate foreign interference with its relations with its subjects.

If one rejected this doctrine a government which desired wrongfully to despoil the peaceful foreigners residing on its territory would have an easy means of doing so, when these foreigners had founded a commercial association invested with civil personality. It would take care not to confiscate the private possessions of the partners and more particularly it would scrupulously respect their shares or interest in the concern. It would confiscate the estates, buildings, and goods of the association and if the unfortunate foreigners showed any sign of invoking the assistance of their own country, the spoliating government would haughtily take its stand on its independence and national dignity for the rejection of what would be described as an act of illegitimate intervention.

The stratagem would be too simple: a higher principle of law prohibits the doing indirectly of that which may not be done directly, and a diplomatic claim will be possible as it would have been if the confiscation had been directed against the shares or separate interests. And as the indemnity can only be equitably fixed after an attentive examination of the financial situation of the association, the diplomatic agent of the nation to which the aggrieved alien belongs will be entitled to watch over the different operations, the preparation of abstracts, the valuation of stock, the estimate

made with reference to the solvency of the debtors, etc., which are necessary for the purpose of drawing up a balance sheet (1).

But it is only in the interest of the foreign partner and in case of refusal of justice that this examination of the association's affairs is placed under the surveillance of the diplomatic agent : the latter will accordingly have to confine himself scrupulously to the defence of the rights of his compatriot ; he is not charged with the duty of supporting the interests of the other partners, nor even those of the society, and if he usurped this role, his interference would certainly be illegitimate. Nor could he, any more, insist on the payment of the creditors of the association, nor have recourse to diplomatic pressure in order to constrain the debtors of the association to discharge their debts ; any intervention of this nature is forbidden : the amounts owing to and by the association have been taken into account in *the estimate* of the interest possessed by the aggrieved partner, but beyond that it is not permissible to go.

All these rules, which appear incontestable, prove that it is not impossible to distinguish two things which though connected are not therefore inseparable. Is it

1 (1) There are so many ways of preparing an inventory that this check upon it is necessary if the rights recognised are to receive a practical sanction.

not permissible to affirm that if the principles on which they rest had been better appreciated by all the persons (advocates, diplomatic agents, or ministers of foreign affairs) who, through a period of fourteen years, discussed the Cerruti question, many difficulties would have been smoothed away, many conflicts avoided?

Mr Galindo certainly was unacquainted with these principles when he laid before the commission of Bogota the conclusions which have been reported and the diplomatists who, after the check received by the commission of Bogota, pursued at Rome with so much good will and loyalty the settlement of the Cerruti claim, did not succeed without trouble in making them clear (1). At the outset Italy persisted, as may be imagined, in demanding reparation for all the injury, of every kind, sustained by Mr Cerruti, and Columbia was not less firm — and this too is natural — in affirming that the claims of the firm of E. Cerruti and Co could not concern the Italian government. The diplomatists invoked on each side just and contradictory principles, and in default of their perceiving the term of conciliation, the negotiations did not advance.

On February 23rd 1891 an important step forward

(1) On the 31st of March 1891, the two governments were in accord on all points except that, and General Posada even sent to Mr Damiani the draft of a protocol; the disagreement which existed on this point alone prevented the signature of this convention.

was taken : General Posada proposed to entrust to a commission of arbitration the task of determining, by an examination of the business books, the value of Mr Cerruti's interest in the firm of E. Cerruti and Co.

On the basis of Mr Cerruti's interest in the capital of the firm of Mr E. Cerruti and Co, calculated in the manner indicated, the Columbian legation undertook to pay an equitable indemnity to Mr Cerruti; this arrangement could not fail to give full satisfaction to the Italian government (1).

This note of general Posada does the greatest honour to the perspicacity of its author, and the adroit diplomatist showed further that he was an excellent jurisconsult when he wrote : « I do not see for my part any impossibility nor even any difficulty in distinguishing the personal right of the Italian subject, Er-

(1) The Columbian minister plenipotentiary asked that Cerruti should produce the balance sheet of the firm of E. Cerruti and Co for december 31st 1884, a date twenty days earlier than the outbreak of the revolution in Cauca. The commission consisting of from three to five well-known merchants of Rome, belonging to different nationalities, was to proceed, as in the usual way of commerce, to the *theoretical* liquidation of the firm, in order to establish according to the balance sheet and the partnership articles the net share of Mr Cerruti. Nothing came of this proposition because Mr Cerruti replied that he could not supply the balance sheet, inasmuch as the books of the firm had been sequestered by the Columbian government. This reply was an evasion, for the accounts were at the disposition of Mr Cerruti, as will be seen further on — *Official publication*. pages 534 and 537.

nesto Cerruti, in the firm, and the property of the Columbian firm which bears his name ; this distinction is established in Columbia as in Italy, and everywhere else, by means of liquidation ».

But these propositions were not studied as they deserved ; Mr Cerruti, persevering in his tactics, was unfavourable to them, and above all the Columbian government conducted at Bogota negotiations in which it was inspired by ideas of a diametrically opposite character (1).

(1) The Columbian government indeed conducted at Bogota with the Italian representative parallel negotiations in which it endeavoured to impose ideas quite different from those which were advocated by the distinguished General Posada.

During the year 1892, he had obtained from Congress a special law authorizing the supreme court « to give a decision, acting at one and the same time as a court of first instance and a court of final appeal, on the claims presented against the Columbian government by Ernesto Cerruti in his character as an alien or as manager of the Columbian firm of Cerruti and Co. »

Mr Cerruti, as was natural, took good care not to present himself before this tribunal.

The following year Mr Suarez, Minister of Foreign Affairs, signed *ad referendum* with Chevalier Pisani Dossi, resident Italian minister in Columbia, a convention by the terms of which the indemnity which might be due to Mr Cerruti by reason of the direct injury suffered by him would be fixed by diplomatic agency ; on the contrary the losses sustained by the firm of E. Cerruti and Co would be estimated by the Columbian tribunals.

But this convention was not ratified for it appeared unacceptable to the Italian diplomatic representatives and « on inquiry it was demonstrated that Cerruti would undoubtedly do nothing which would enable the convention to be put into practical application ». (Letter of Mr Brin, Italian minister, of foreign affairs to Mr Hurtado, July 24th 1893. *Official publication*, p. 528).

The confusion was still as inextricable as ever. At last the two governments, despairing of coming to an understanding, took the only fitting course: since it was necessary to have recourse to a commission or tribunal of arbitration for the purpose of fixing the amount of the damages due to Cerruti by the government of Columbia, why should not the arbitrator be asked at the same time to determine which, of the claims made by Mr Cerruti, could properly be made the subject of an examination by an international tribunal?

This proposition was accepted and after four years of fruitless negotiations the protocol of Castellamare was signed August 18th 1894 (1).

(1) It is important to bear in mind that the Cerruti case was only submitted to an international tribunal on account of the special circumstances which had arisen to complicate its examination. Moreover the Italian government recognised at this epoch that foreigners are not, in principle, authorised to solicit the support of their government until the ordinary means of redress for the abuse complained of have been exhausted. On October 27th 1892 it had signed a treaty of commerce and friendship with Columbia, of which article 21 is thus set forth:

« The two contracting parties, desirous of avoiding discussions which might affect their friendly relations, agree that, with respect to claims or disputes of private individuals coming within penal, civil or administrative jurisdiction their diplomatic agents will refrain from interfering, except in cases where there may arise a question of refusal of justice, of extraordinary or illegal delay in rendering justice, of failure to execute a definitive sentence, or further if there be an express violation of the covenants existing between the parties or of the rules of international law, either public or private generally recognised by civilised nations ».

By this protocol it was settled that the two parties should ask His Excellency the President of the United States of America to be good enough to accept the office of arbitrator in the litigation.

As soon as the arbitrator by his acceptance of the office shall have qualified himself to enter upon its functions, he shall become vested with full power, authority and jurisdiction to do and perform, and to cause to be done and performed, all things without any limitation whatsoever which in his judgment may be necessary or conducive to the attainment in a fair and equitable manner of the ends and purposes which this agreement is intended to secure.

And he shall thereupon proceed to examine and decide according to the documents and evidence that may be submitted to him by each of the two governments or by the claimant as one of the two parties interested in the suit and the principles of public law, first, which, if any, among the said claims of Senor E. Cerruti against the government of Columbia be a proper claim or claims for international adjudication, and, secondly, which, if any, of the said claims of Senor E. Cerruti against the government of Colombia be a proper claim or claims for adjudication by the territorial courts of Columbia. And respecting the claim or claims, if any, which in the judgment of the arbitrator shall have the character of and belong to the first class of claims above defined, the arbitrator shall proceed to determine and to declare the amount of indemnity, if any, which the claimant Senor Cerruti be entitled to receive from the government of Columbia through diplomatic action. And regarding the claim or claims of Senor E. Cerruti, if any, which in the judgment of the arbitrator shall possess the character of and belong to, the second class of claim above defined, the arbitrator shall have to declare them to be and shall take no further action in the matter of such claim or claims.

The two governments « solemnly bind themselves to abide by the decisions and awards of the arbitrator, which shall be final and conclusive and not subject either to discussion or appeal. »

Further « they agree not to re-open any discussion or negotiation whatever on any of the points which the arbitrator may decide or dispose of or which he may declare to have already been disposed of in conformity with international public law, nor upon any claim or claims of Senor Cerruti which the arbitrator may declare to have an internal and territorial character. »

Was this compromise of Castellamare going to lead at last to the settlement of the Cerruti question? The diplomatists who signed it certainly hoped so, and they had taken care to submit the questions so clearly that any difficulty with respect to the extent of the arbitrator's powers seemed impossible. ,/

However, if one may say so, the choice of an arbitrator had not been made in the happiest manner. The author of these pages will not be suspected of hostility towards the United States of North America : he has many a time affirmed — and he has no objection to repeating it here — that *this great and admirable people* are the most advanced of all in modern economic and social evolution and that, with certain reserves which will be easily made by every clear-sighted intelligence, we may describe them as the pioneers in the , (

way which the decrees of Providence have decided that contemporary societies shall follow.

But it is no denial of this incontestable superiority to say that the Americans, induced by circumstances to devote all their efforts — and with what success! — to turning their territory to account, have not yet had either the occasion or the time to carry as far as other nations the study of the questions which belong to the domain of pure abstraction, nor to develop as fully the intellectual qualities which this study supposes. When we bear in mind the excess to which Latin races are often led by their fondness for theorising, we may ask whether this pretended deficiency is to be regretted. It seems however that there was reason to take these considerations and the special character of the American mind into account. This would not indeed have been necessary if it had been a question of choosing as arbitrator one of the illustrious professors who expound international public law with so much weight in the chairs of several American universities; but the case was different for so impersonal a choice as that of a chief of the state, little qualified perhaps to resolve the delicate legal questions submitted by the protocol of Castellamare (1).

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(1) It is only just moreover to add that Italy in accepting the arbitration of President Cleveland gave a striking proof of her spirit of conciliation. The Munroe doctrine is always a very living

If we take into account the fact the compromise left in the background a special question which was bound to arise, in connection with that of the amount of the indemnity, we shall easily understand how the award of Mr Grover Cleveland, far from deciding the dispute, rendered the contest more acute and brought the two governments to the verge of war.

t/ Unfortunately, the line of conduct which the advocate of Columbia before the arbitration tribunal at Washington, Mr Calderon Carlisle, thought fit to adopt was not calculated to enlighten the judge and only served to compromise the interests which he was charged to defend. s/ The legal doctrine contained in the conscientious statement of the learned advocate may be reduced to the two following conclusions :

Firstly, he said, the claims of Mr Cerruti, which might constitute matter for an international decision, have already been the subject of a judgment, since it is by his fault alone that the commission of Bogota has been prevented from making its award.

In the second place, even if this first conclusion were not admitted, Mr Cerruti cannot now submit any claim to the examination of a body exercising powers of international jurisdiction.

one in the United States and it is well-known that the government of Washington, whatever may be the motive which it obeys, shows special vigilance in the defence of the rights of the American Republics.

for he has already received 10.000 pounds sterling (1), which represents much more than the value of the goods confiscated or damaged. That part of the claim of Mr Cerruti, which is based on the loss he has sustained by reason of the confiscation of the property belonging to the firm of E. Cerruti and Co, cannot be examined by the international arbitrator and is certainly reserved for the exclusive cognisance of the Columbian courts.

It will be understood how difficult it was to obtain the acceptance of these two conclusions. The first might have been upheld five years earlier, and in fact it was upheld for some time by the Columbian government. But was it not evident that Columbia had soon abandoned this ground of defence ? It was easy for the illustrious advocates who at Washington defended the cause of Mr Cerruti, Messrs Frédéric Coudert and Mallet Prevost, to quote diplomatic correspondence showing that Columbia had consented to discuss afresh the Cerruti question ; besides was not the signature of the protocol of Castellamare itself a proof that, if the two parties did not come to an understanding on the extent to which Mr Cerruti's claims were to be submitted to arbitration, at least they agreed that certain of his claims ought to be the subject of arbitration.

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(1) During the course of the diplomatic negotiations entered upon at Rome in 1890, the Columbian government had indeed paid 10.000 pounds sterling, on account of the indemnity which might be due to Mr Cerruti.

d/

The second conclusion of the advocate for Columbia was as difficult to defend. Doubtless Columbia had not yet completely admitted the distinction, several times affirmed by Italy, between the affairs of the Columbian firm of E. Cerruti and Co. and the interest of Mr E. Cerruti, an Italian subject, in that firm, but should a clever tactician have made all his efforts to maintain the ancient confusion ?

Already the Spanish mediator had pointed out that Cerruti personally was justified in complaining of the confiscation of the property of the firm E. Cerruti and Co.; the Columbian government had, in several notes, shown that it was not very far from adopting this doctrine, formally accepted by one of its best diplomats, General Posada, and when over and over again, Columbia wished to make restitution of the property of the firm, E. Cerruti and Co., it always notified its offers to Mr Cerruti — a perfectly natural step since the charges brought against that Italian subject were the sole cause of the confiscation.

The learned advocates of Mr Cerruti invoked numerous arguments, having reference both to fact and to law, for the purpose of demonstrating the error of their adversary. With great legal propriety they limited the claim of their client to the value of his pretended property at Salento and of his interest in the firm (1)

(1) It will be remembered that according to the partnership deed of 1879 this share was 30 per cent.

and they pointed out that if the examination of the accounts of the firm of E. Cerruti and Co. was necessary in order to ascertain the extent of Mr Cerruti's international claim, such examination was a simple act of procedure « and no claim was presented in the name of the other partners, nor even in the name of the creditors, *except in so far as the extinction of the debts of the firm was necessary in order that Mr Cerruti might receive and keep the sum representing his share in the net capital of the firm* » (1).

The indemnity claimed in the name of Mr Cerruti amounted to the figure of 289.998 pounds sterling, or more than 7.250.000 francs (2).

(1) Statement of case and brief on behalf of Ernesto Cerruti, p. 121.

(2) This sum of 289.998 pounds sterling was made up as follows :

a) Direct personal injury, imprisonment. privations.....	Pounds sterling 60.000
b) Advocates' fees.....	30.400
c) Estate at Salento, stock and cattle.....	38.710
d) Expected profits of the property at Salento from 1885 to 1894.....	82.788
e) Share brought in by Mr Cerruti and 30 per cent of the net assets of the firm of E. Cerruti and Co.....	51.074
f) 30 per cent of the commercial value of the business E. Cerruti and Co, calculated multiplying by 5 the annual profits	23.084
g) Sundries	3.942
Total.....	289.998

Paragraphs c e f alone represent the value of the private estate

of Mr Cerruti in 1883 and if we set aside the other paragraphs, the total of £ 289.998 falls to £ 112.868. And the latter sum even was much exaggerated: thus the sum contributed by Mr Cerruti to the business and his share of 30 per cent in the firm E. Cerruti and Co (paragraph e) only amounted, according to the calculation even of his learned advocates, to 24.374 pounds sterling; but to this was added the compound interest of this sum at 7 per cent per annum, calculated and credited every half year from feb 12th 1883 to november 12th 1893, viz £ 26.700 and thanks to this augmentation of more than 100 per cent the figure of 51.074 pounds sterling was reached. It is proper also to make every reserve with respect to paragraph c, for the estate at Salento was not the private property of Mr Cerruti; it belonged to the firm E. Cerruti and Co but, in spite of all proofs, Mr Cerruti has always persisted in maintaining that this estate was his exclusive property.

IV

On March 2nd 1897, that is to say — and this circumstance should be carefully noted — forty [^]eight hours before the expiration of his presidential powers, Mr Grover Cleveland gave his award, in which he rejected the conclusions of Columbia and allowed Mr Ernest Cerruti an indemnity of sixty thousand pounds sterling. -/

The complete text of the award is as follows :

Award of the president of the United States under protocol concluded the eighteenth day of August in the year one thousand eight hundred and ninety-four between the Government of the Kingdom of Italy and the government of the Republic of Colombia.

This protocol concluded August 18th 1894, between the Kingdom of Italy and the republic of Colombia [^]was entered into for the purpose of putting an end to the subjects of disagreement between the two Governments growing out of the claims of Signor Ernesto Cerruti against the Government of Columbia for losses and damages to his property in the State (now Department) of Cauca in the said Republic, during the political troubles of 1885, and for the further purpose of making a just disposition of said claims. By the terms of the protocol, each Government agreed to submit to arbitration the matters and claims above referred to, for the 2/

2 purpose of arriving at a settlement thereof as between the two Governments, and they joined in asking me, Grover Cleveland, President of the United States of America, to accept the position of arbitrator in the case and discharge the duties pertaining thereto as a friendly act to both Governments, vesting in me full power, authority, and jurisdiction to do and perform and to cause to be done and performed all things without any limitation whatsoever which in my judgment might be necessary or conducive to the attainment in a fair and equitable manner of the ends and purposes the agreement is intended to secure.

+ Pursuant to the terms of the said protocol, the two Governments, and the claimant, Signor Ernesto Cerruti, as one of the two parties interested in the suit, have submitted to me within the time specified in said protocol the documents and evidence in support of their several asserted rights.

Now, therefore, be it known, that I, Grover Cleveland, President of the United States of America, upon whom the functions of arbitrator have been conferred as aforesaid, having duly examined the documents and evidence submitted by the respective parties pursuant to the provisions of said protocol, and having considered the arguments addressed to me in relation thereto, do hereby decide and award :

1. That the claims made by Signor Ernesto Cerruti against the Republic of Colombia for losses of, and damages to, the real and personal property owned by him individually in the said State of Cauca, and the claims of said Signor Ernesto Cerruti for injury sustained by him by reason of losses of and damages to his interest in the firm of E. Cerruti and Company, are proper claims for international adjudication.

2. That the claim submitted to me by Signor Ernesto Cerruti for personal damages resulting from imprisonment, arrest, enforced separation from his family, and sufferings and privations

endured by himself and family, is disallowed. I therefore make no award on account of this claim.

3. The claim of Signor Ernesto Cerruti for moneys expended and obligations incurred for legal expenses in the preparation and prosecution of this claim, including former and present proceedings, is disallowed by me.

4. I award for losses and damages to the individual property of Signor Ernesto Cerruti in the State of Cauca and to his interest in the copartnership of E. Cerruti and Company, of which he was a member, including interest, the net sum of sixty thousand pounds sterling, of which sum ten thousand having been already paid, the Government of the Republic of Colombia will, in addition, pay to the Government of the Kingdom of Italy for the use of Signor Ernesto Cerruti, ten thousand pounds sterling thereof within sixty days from the date hereof, and the remainder, being forty thousand pounds, within nine months from the date hereof with interest from the date of this award at the rate of six per cent per annum until paid, both payments to be made by draft payable in London, England, with exchange from Bogota at the time of payment.

h/ 5. It being my judgment that Signor Ernesto Cerruti is, as between himself and the Government of the Republic of Colombia, which I find has by its acts destroyed his means for liquidating the debts of the copartnership of E. Cerruti and Company for which he may be held personally liable, entitled to enjoy and be protected in the net sum awarded him hereby, I do, under the protocol w^hich vests me with full power, authority and jurisdiction to do and to perform and to cause to be done and performed all things without any limitation whatsoever which in my judgment may be necessary or conducive to the attainment, in a fair and equitable manner, of the ends and purposes which the protocol is intended to secure, decide and adjudge to the Government of the

Republic of Colombia all rights legal and equitable of the said Signor Ernesto Cerruti in and to all property, real, personal and mixed in the Department of Cauca and which has been called in this proceeding; and I further adjudge and decide that the Government of the Republic of Columbia shall guarantee and protect Signor Ernesto Cerruti against any and all liability on account of the debts of the said copartnership and shall reimburse Signor Ernesto Cerruti to the extent that he may be compelled to pay such bona fide copartnership debts duly established against all proper defences which could and ought to have been made, and such guaranty and reimbursement shall include all necessary expenses for properly contesting such partnership debts.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in duplicate at the city of Washington on the second day of March in the year one thousand eight hundred and ninety-seven, and of the independence of the United States the 121st.

(Signed) GROVER CLEVELAND

By the President :
RICHARD OLNEY,
Secretary of State.

Before relating the painful incidents of which this award was the origin it is important to offer some observations with respect to it.

To begin with, one notices with surprise, on reading the text, that Mr Grover Cleveland does not give the reasons of the five decisions which he formulates. *His award states no grounds.* It is difficult to determine

the cause of this omission. Was Mr Grover Cleveland prevented by want of time (1) from setting forth the reasons which guided him? Or did he think that « the full powers, authority and jurisdiction » with which he was invested by the protocol of Castellamare relieved him of this task; in any case the award shows on this point an omission which is much to be regretted.

(1) The protocol of Castellamare had named as arbitrator not Mr Grover Cleveland personally, but his Excellency the President of the United States of America; it follows that the judicial powers of Mr Cleveland in the Italo-Columbian conflict terminated with his presidential powers.

If Mr Cleveland had not given his award before March 4th 1897, Mr Mac-Kinley would, of right, have been substituted for the ex-president in his functions as arbitrator. It is held generally that if a sovereign or the president of a Republic « has been chosen as arbitrator in his capacity of chief of the state, it is to be presumed that the mandate applies indifferently to whatever person may happen to be at the head of the state at the moment of its exercise » (Merignhac, *op. cit.* § 211) The practice also tends to establish the same doctrine: upon the death of Alphonse XII, King of Spain, the Queen Regent became arbitrator in the dispute between Columbia and Venezuela, and this very year, Mr Emile Loubet, President of the French Republic, has inherited, of right, the functions which Columbia and Costa Rica had entrusted to President Faure.

The inconveniences attending a change of arbitrator are so grave, above all when the case has been inquired into and the advocates' statements submitted, that one can very well understand that Presidents of Republics, approaching the end of their term of office, should make every effort to prevent it: but the same result would be attained, if the governments declared, in the compromise, that the President of the Republic would retain his functions as arbitrator, even after the expiration of his presidential powers. This solution however would not always be free from inconveniences.

All domestic legislation imposes on magistrates the rigorous obligation of stating the grounds of their sentences and everybody approves the wisdom of the French Cour de Cassation, which every year annuls by reason of the insufficiency of the grounds such a large number of judgments and sentences. The reasons of this requirement are obvious : it stimulates the judge to examine the facts and the legal principles on which he bases his decision and thereby strengthens the guarantees of the parties who appear before him ; it also gives greater weight to the sentence since the opposing parties themselves and others concerned in the case can easily ascertain whether it is well founded. As Mr Pierantoni, the Italian jurisconsult, so excellently says in the severe criticism which he has made of Mr Cleveland's award (1) « Justice is light and truth. It must show itself in a visible form ; the judge must justify his judgment, which is an operation of the mind, an act of research by which, after hearing the parties, defining and presenting the issues and verifying the facts, he gives a decision, pointing out rules of law which have determined his judgment. A statement of the grounds of act and law, if it is required as a gua-

(1) *La Nullité d'un arbitrage international* by Mr Auguste Pierantoni, senator of the Kingdom of Italy. member of the institute of International Law, *Revue de Droit international et de législation comparée* 1898. vol XXX.

rantee by the law of procedure, is a necessity of international society. »

Indeed if a statement of the grounds of a decision is so necessary in deciding suits between simple citizens, how can it be considered to be less so when it is a case of bringing international disputes to an end and saving nations from the scourge of war? Accordingly article 25 of the *Rules for procedure in International Arbitration*, established by the Institute of International Law, provides that « the arbitration award must be drawn up in writing and contain a statement of the grounds of the decision, unless this requirement is dispensed with by a special stipulation of the compromise ».

In private law judgments are liable to be annulled when the judge has not given his decision on all the points submitted by the parties. The reasons for admitting such a ground of annulment will easily be perceived. The judge, by omitting to reply to all the questions which the parties have submitted, might easily present the case under a false light, and even if the omission were involuntary there would at least be reason to fear that he had not considered the question in all its aspects.

This obligation of giving a decision on all the pleas submitted by the parties ought to be still more rigorous in the case of the international judge, since the latter does not derive his powers from the general provi-

sions of the law, but from the free agreement of two sovereign and independent states which have consented to submit their pretensions to him. It is a matter for surprise that Mr Cleveland, to whom two definite questions were submitted (the first : are any of the claims of Mr Cerruti within the competence of an international tribunal ; the second : are any of the claims of Mr Cerruti within the competence of the Columbian tribunals). should have thought it necessary to answer only the first and should have entirely omitted to answer the second. The second reply would have offered, as we shall see, considerable interest.

Without dwelling on the other observations of a general character which might be made with reference to the decision of March 2nd 1897, it is desirable to examine the part of this award which aroused warm and persistent protests from Columbia, until the date when an Italian squadron was despatched to the coasts of that republic.

The first four paragraphs of the award have never been the subject of any recrimination on the part of Columbia. The point cannot be too strongly insisted upon that this power never contested the fact that she owed an indemnity to Mr Cerruti, and in order clearly to show her intention, she had consented, four years before the signature of the protocol of Castellamare, to pay on account a first sum of 10.000 pounds sterling : she only demanded that the indemnity should be

equitably fixed, and above all that the diplomatic support of the Italian government should never be given to the claims of a firm of Columbian nationality, the firm of E. Cerruti and Co. Within the two periods fixed by the arbitrator, Columbia paid regularly and with the due interest the sum of 50.000 pounds sterling, in addition to the 10.000 pounds previously paid (1).

2/ On the contrary the decision contained in paragraph 5 has been attacked by Columbia with extreme vivacity. This paragraph contains two provisions : on the one hand it adjudges to Columbia « the rights of Mr Cerruti over all real, personal, and joint property in the department of Cauca » ; on the other hand it decides that Columbia shall guarantee Mr Cerruti against all liability with regard to the creditors of the firm of E. Cerruti and Co, « because Mr Cerruti is entitled to

(1) Columbia affirms that this indemnity of 60.000 pounds sterling is very much exaggerated. Once more we see how much it is to be regretted that Mr Cleveland did not think it necessary to state the grounds of his decision : an indemnity of 60.000 pounds sterling is allowed, but since the claims based on moral damage and the previous costs are expressly rejected, it is difficult to see how the illustrious arbitrator arrived at this figure of 60.000 pounds. If the estate at Salento formed part of the partnership property, as all the title deeds attest, the private fortune of Mr Cerruti, apart from his interest in the firm of E. Cerruti and Co, must have been very modest; on the other hand, it is by no means proved that the firm of E. Cerruti and Co was solvent (*vide infra* Appendix). Hence it may appear that the indemnity of 1.500.000 francs is not justified and it would have been better to show that it was legitimate. ^

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the enjoyment and guarantee of the net sum which is adjudged to him by these presents. »

Certainly no principle of law can be invoked in support of the first decision [^] and it seems that previously the annals of jurisprudence afforded no example of a litigant obliged to buy against his will the real and personal property of his adversary on the ground that he had in some way injured its value.

Undoubtedly the learned advocates of Mr Cerruti had endeavoured to demonstrate that their client could not return to Columbia, where his person and property were not safe, and that consequently it was impossible for him to accept any restitution in kind; besides, added M^{re} Coudert and Mallet-Prévost, « the restitution of the ruins of the former properties of Mr Cerruti would be a comedy of justice! You might as well give him an estate in the moon » (1). But these arguments are destitute of legal value: since the judge granted a pecuniary indemnity, the latter should have been fixed at such a figure that Mr Cerruti sustained no loss: the arbitrator had in that respect full powers and should have used them, but the award pronounced, although

(1) Statement submitted in the name of Mr Cerruti by M^{re} Frédéric Coudert and Mallet-Prévost, p. 123.

responding to the most ardent desire of Mr Cerruti (1), was certainly illegal (2).

The irregularity of this first solution is however of little theoretical and practical importance, and the Columbian government contented itself with merely pointing it out. On the contrary the second decision of paragraph 5, relative to the payment of the debts of the firm of E. Cerruti and C^o, has been considered by Columbia as derogatory to its sovereign rights and to its independence and the Republic took care to declare, in carrying it out, that it only yielded to force.

Before examining the legal value of the solution admitted by Mr Cleveland, it is desirable to set forth the elements of the problem which the illustrious arbitrator had to solve. For the sake of clearness let us take figures ; let us suppose, adopting as a basis the solution contained in the award, that on December 31st 1884 the total fortune of Mr Cerruti was equal to 60.000 pounds sterling, of which 30.000 pounds was represented by various estates, chattels, and different sums owing : the other 30.000 pounds would represent the value of Mr Cerruti's interest in the net assets of the firm of E. Cerruti and C^o. Let us further suppose that

(1) *Vide supra*, p. 40.

(2) Thus the award of March 2nd 1897, already tainted with nullity by reason of its omissions, was also null for excess of power and essential error. » (Art. 25 of the regulations for procedure in international arbitration).

this society was solvent (1) and that it had for example a capital of two and a half millions and liabilities amounting to 1.500.000 francs. On reading attentively paragraph 3 of the award, one perceives the grave difficulty which has preoccupied the arbitrator ; namely the fact that if the abuses of power of 1885 had not been committed, M^r Cerruti would have remained in possession of a fortune of 60.000 pounds sterling. The creditors of the firm would have been paid by the firm in the usual way, and consequently, although M^r Cerruti in his capacity as *commandité* *would have been jointly and severally liable for all the firm's debts*, this purely theoretical liability would never have affected him practically.

Then occur the events of 1885. If M^r Cerruti is only to receive an indemnity of 60.000 pounds sterling, it is certain that the whole of this sum will be absorbed by the creditors of the firm of E. Cerruti and C^o. The latter indeed have two debtors who are jointly and severally liable ; one the firm of Cerruti and C^o which is completely insolvent on account of the confiscations of which it has been the victim, the other the *commandité*, M^r Cerruti, who recovers his solvency

(1) This supposition also arises from paragraph 4 of the award : the arbitrator allows M^r Cerruti an indemnity for damage « caused to his share in the firm of E. Cerruti and C^o » ; he must therefore have considered the firm to be solvent.

in consequence of the indemnity which is awarded to him. Evidently these creditors will not fail to proceed against Mr Cerruti, but as the debts amount to 1,500,000 francs, Mr Cerruti will retain nothing, and he will not even find himself liberated from liability, since the amount of the debts has been increased by the interest. It is necessary then either that a supplementary indemnity of 1,500,000 francs should be awarded to Mr Cerruti or that the Columbian Government should be compelled to reimburse to Mr Cerruti the amount of the debts of the firm E. Cerruti, which the latter would be obliged to discharge. That is manifestly the reasoning which had weight with the honorable President of the United States. He perceived clearly that his duty was to replace Mr Cerruti in the financial position which he occupied before the events of 1885, and he saw that his decision would be incomplete and would engender new difficulties, unless he dealt with the redoubtable question of the settlement of the debts of the firm of E. Cerruti and Co (1).

It was not the first time this question had been examined. In his memorandum of the 31st of March 1893,

(1) Throughout these lines it is assumed that the firm of Cerruti and Co, was a *Société en commandite*; if it were true, as has been sometimes contended, that it was a *société en nom collectif*, the argument would nevertheless hold good, for the obligation of the partner *en nom collectif* is the same as that of the *commandité*.

2/ Mr Brin, the Italian Minister of foreign affairs, studied 2/ this delicate question at length, and it seemed to him that it could only be solved by the purchase on the part of the Columbian government of the claims existing against the firm of E. Cerruti and C^o; in his belief this purchase could be made on not very onerous conditions, since in view of the complete insolvency of the firm of E. Cerruti and C^o, the vendors were not likely to be very exacting.

In the conclusions that had been submitted in the name of Mr Cerruti to the arbitrator at Washington, the learned American advocates thus expressed themselves :

2/ Mr Cerruti is entitled to a discharge in *some form* from liability 2/ to the creditors of the firm; as has already been said, any award which fails either to protect him from these creditors or to give him the means of satisfying them himself will be illusory. How that result is to be brought about is a matter of indifference to him : he does not seek to collect, on account of the creditors, a single penny for himself. Let Columbia furnish him proper discharges from those liabilities and he will be satisfied to have the amounts which may be due paid directly to the creditors themselves. If this is impossible let it be ascertained according to the business books, which the Columbian government holds, what sums shall be paid to each creditor, let these sums added up together with an ample lump sum to cover the costs and expenses of the various suits which have been or may be brought by the creditors, be paid to Mr Cerruti so as to enable him to meet the demands that will be made against him (1).

This reasoning had convinced Mr Grover Cleveland, who did not find in the statement of Mr Calderon Carlisle any argument which refuted it. Many objections could however have been brought against such a legal doctrine ! Undoubtedly if we only take into consideration the situation of Mr Cerruti, the reasoning appears legitimate, and it leads necessarily to the conclusion ; but the question has two sides, and it is not sufficient only to examine one of them. The arbitration tribunal of Washington, freely chosen by agreement between the parties, was only competent to deal with the indemnities and restitution *to be accorded to Mr Cerruti, an Italian subject* ; with regard to all other persons connected by nationality with any other power than Italy, its incompetence was absolute, and any decision given directly or indirectly in their favour was an illegitimate interference with the internal affairs of Columbia. Now the numerous creditors of the firm of Cerruti and Co, a Columbian firm, have received by the award of March 2nd 1897 an advantage at least equal to that which Mr Cerruti derived from it. Previously the claims of these creditors were absolutely valueless and they would willingly have given them up for the weight of

(1) Statement submitted in the name of Mr Cerruti by Mrs Frédéric Coudert and Mallet-Prévost, page 124.

ends /

the paper which attested them, for the debtor firm had no longer any form of assets. In these circumstances, security for the claims is unexpectedly supplied by a perfectly solvent debtor. With a few exceptions, none of these creditors is of Italian nationality : *some are Columbians, others are English or French, and others again are Germans or Americans.* No matter : *all profit alike and that in consequence of the diplomatic interrention of Italy, an intervention strictly limited, as the Italian diplomatists have always repeated, to the defence of the rights of an Italian subject.* Truly is it possible to imagine a more abusive and vexatious interference in the internal affairs of a state ? If such principles prevailed, what would become of the independence of a nation which like Columbia affords hospitality to so many foreigners ?

The creditors, sufferers also by the acts of 1885, were justified in claiming an indemnity, and nobody contests their right, but they could only carry their claim before the Columbian tribunals, and at the most those among them who were not of Columbian nationality had the right to demand the support of their governments in the event of the indemnity granted being delayed or insufficient.

Doubtless it will be said, in order to justify the solution adopted by the illustrious arbitrator, that it was necessary to indemnify M^r Cerruri, not merely in appearance, but in reality, for the injury that had been cau-

sed to him in 1885. But this argument cannot prevail against the higher principle of the independence of nations, and if indeed it was necessary to choose between the rights of Mr Cerruti, and a state's rights of sovereignty, would it be possible seriously to hesitate and prefer those of Mr Cerruti?

J

Besides it is not demonstrated that the choice was limited to these two terms, and that it was impossible to respect two rights of unequal importance but equally respectable. Might not the solution of the problem be found in a theory which has just been expressly sanctioned by a recent decision of the Italian Court of Cassation given on February 28th 1899?

The firm of Isaac and Samuel, of London, declaring itself to be a creditor of the firm of E. Cerruti and Co for a sum of 14.433 pounds sterling, served in December 1896 upon the Minister of foreign affairs for the Kingdom of Italy an attachment on « any sum, whatever it may be, which may be handed over to that Minister by the government of Columbia in the name of Mr Cerruti ». The Court of Cassation at Rome has annulled this attachment « because an international judgment is not subject to any interference by ordinary judicial authority under whatever form this interference may appear, and the stipulations of diplomatic agreements are capable of derogating from the ordinary law ».

It is absolutely inadmissible, continues the Supreme Court, that a convention between two states should be subjected to the laws and judicial authority of one of them. And it has been justly observed that states treat and contract with one another in the fulness of their sovereignty, without taking into account their own internal laws; their pacts and conventions form a higher law, inaccessible to any modification resulting from the application of the ordinary laws, in force in their territory.

It will be further observed, according to the above mentioned considerations, that an internal judicial authority is not permitted to interpret an international sentence and by that interpretation paralyse its execution, which is not subjected to the control of the governments at whose instance it has been given. Hence the ordinary judges cannot enforce an attachment, the effect of which would be to paralyse execution. It is in vain to contend that the international sentence is, for the creditors of the society, *res inter alios judicata*, since they are third parties considered in reference to a treaty entered into by two states.

It has been rightly observed that it is important to distinguish whether the third party is another state or a private person. In the first hypothesis, the treaty concluded without the knowledge of another state could not cause prejudice to the contested rights of that state. But the situation is entirely different when the treaty diminishes rights belonging to private persons or inflicts upon them eventual damage.

In this hypothesis, it has been decided that the diminutions or limitations of the rights of third parties would not be a sufficient reason for placing an obstacle in the way of execution. Private persons might claim and ought to obtain an indemnity paid by the state which had caused the injury, but they could not demand suspension of execution, and there is nothing in this but

what is in conformity with the law of nations, which is superior to private right.....

The doctrine set forth in this fully explained decision seems very sound and judicial and if it is true that treaties between states are superior to the internal laws of the governments signing them, this principle acquires still greater force in the case of an international sentence.

Further it must never be forgotten that the authority of an international tribunal, by the very fact of being a *very grave* exception to the competence of the internal tribunals of a country, cannot, *either directly or indirectly*, injure or benefit private persons other than those in favour of whom diplomatic intervention has taken place.

On account of the strictly limited character of the diplomatic intervention of Italy, the indemnity of 60.000 pounds sterling, imposed on Columbia, could not either *directly or indirectly* benefit the creditors of the firm of E. Cerruti and C^o: with respect to the latter, no account was to be taken of it, and for them the arbitration award was *res inter alias judicata*.

It is true that the objection may be made to this system that by all codes of legislation, as by article 2092 of the French Civil Code, all the possessions present and to come of a debtor are pledged to the creditors in common. How then, it will be said, can one

propose in the presence of such a principle, to withdraw from this pledge the indemnity paid by the Columbian government? This objection is not perhaps as irrefutable as it seems, because it would be necessary to *begin* by demonstrating that the creditors of the firm of E. Cerruti and C^o have the right to profit by a judgment emanating from a judge who could not have accepted their intervention. The American arbitrator wished to repair the injury suffered by Mr Cerruti, but he did not wish, nor was he empowered [^] to repair that which had been caused to the creditors of the firm of E. Cerruti and C^o : the indemnity accorded to that Italian subject was accordingly protected from all seizure on t^heir part.

Whatever may be the value of this theory, it seems certain in any case that Mr Cleveland exceeded his powers and seriously infringed the great principle of the independence of nations, by indirectly condemning Columbia to indemnify the creditors of the firm of E. Cerruti and C^o : the latter were not and could not have been parties to the hearing ; the signatories of the protocol of Castellamare did not wish to stipulate and could not have stipulated for any clause which was in favour of individuals not of Italian nationality. The honourable arbitrator, however, not content with granting to Mr Cerruti an indemnity three times as great as that to which the interested party himself claimed to be entitled, further condemned Columbia to pay to the

creditors of the firm of E. Cerruti and C^o a sum of two millions five hundred thousand francs ! (1)

It will be seen that causes of nullity were not wanting in the arbitration award of March 2nd 1897. In vain would one appeal to the fact that the arbitrator had been invested with *full powers, authority, and jurisdiction*, for the protocol of Castellamare also provided that the arbitrator should judge *according to public law*. These two provisions contained nothing which was irreconcilable, because each had its separate sphere of application. In virtue of his sovereign power the arbitrator might regulate the procedure and order such a measure of inquiry as he thought useful for the disclosure of the truth; according to the remark of a publicist « he could have summoned as a witness the President of the Columbian Republic in person. » This discretionary power further permitted him to take for the execution of the sentence such measures as he judged best. But for the purpose of weighing questions of fact and right, for the purpose of forming his conclusion and justifying his award, the arbitrator was bound to remain the docile servant of the superior principles of international public law, and he would

(1) *Vide infra* Appendix and Schedule II. — M^r Cerruti estimated the net assets of the firm of E. Cerruti and C^o at 63.557 pounds sterling; now the indemnity of 60.000 pounds which was granted to him was only legitimate if these net assets amounted to the sum of 168.716 pounds !

have ill-understood the function of a judge if he had claimed for himself, in place of this docility, the right of following the suggestions of caprice.

No reasoning then could withdraw the award of March 2nd 1897 from the application of the principles universally admitted with respect to the nullity of sentences of arbitration. Article 495 of the *codified international Law* of Bluntschli provides that the decision of a tribunal of arbitration may be considered null in the measure in which the tribunal has exceeded its powers. Article 25 of the *Regulations for Procedure in International Arbitration* voted by the Institute of international Law, also decides that « the arbitration award is null in case of excess of power, or of the proved corruption of one of the arbitrators, or of essential error. »

V

The Washington award being liable to be annulled, what course should have been taken to bring about that result ? We can here only point out the most serious defect in the procedure of international arbitration that which, by its mere existence, aggravates all the others and the removal of which would mitigate the effects of all the others : I mean the absence of any means of appeal against sentences of international arbitration.

Whilst all domestic legislation, careful to give litigants all desirable guarantees, multiplies the channels of relief from an unjust sentence and organises cumulatively the means of appeal, international judges decide the disputes between states as if they fulfilled at one and the same time the functions of a court of first instance and a supreme court of appeal, and there is no legal recourse against their awards. For many reasons, however, the right of appeal is more important in this than in any other litigation, even if only — to mention only one reason — because the experience of the judge is less extensive and he is liable

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to do less efficiently that which he is not professionally accustomed to do (1).

The government of Columbia was once more to prove, at its own expense, the gravity of this omission. As soon as the Columbian *chargé d'affaires* at Washington became acquainted with the award, he hastened, during the few hours which still remained before the expiration of M^r Cleveland's powers, to protest against the condemnation pronounced by paragraph 5, relating to the payment of the debts of the firm of E. Cerruti and C^o; the Columbian government approved of his conduct, and after M^r Mac-Kinley became the tenant of White House, he put the government of Washington formally in possession of a demand for revision.

This step did not lead to any result; to the protests of general Rengifo, the Secretary of State for the United States replied, on April 5th 1897, by a laconic note in which he contented himself with declaring that « the

(1) This omission is so grave that it makes the function of the international arbitrator a very delicate one. If it is already a redoubtable task for a man to decide, under the reserve of appeal, according to fixed principles and conforming to the rules of a minutely regulated procedure, the disputes which arise between two simple citizens, how much more redoubtable is the mission of the international judge who has to decide once and for all, conforming only to the rules of procedure which it has pleased him to lay down, and according to rules of law of a less fixed character, the disputes between nations!

President of the American Union deemed himself *functus officio*, so far as the arbitration was concerned, and in consequence he could not take into consideration the demand for revision formulated by Columbia » (1).

On the absence, of any legal means of appeal, only one course lay open to Columbia, namely to appeal to the testimony of Italy herself and obtain from her good will a renunciation of the wrongful condemnation contained in the last part of paragraph 5. She might at the same time solicit the support of other governments and the assistance of the international jurisconsults, who in the silence of their studies, judge sovereignly the sentences of judges. Columbia might take all these steps and she has taken them, but they were not capable of leading to the result which she desired.

Such steps are or may be efficacious when the material strength of the state which has lost its case is greater than that of the winning state, but they are without tangible results for the state possessing the weaker armies and fleets. The time is still far distant, in the ordinary course of things. when diplomacy will

(1) On January 12th 1898 Mr Sherman expressed the same opinion in a second note. He pointed out that even if the reason mentioned in the text did not exist « reasons of delicacy and of high importance would still lead the President not to venture too far in the settlement of the controversy between the Italian and Columbian governments and he could not even substantially modify the award. »

be so faithful in respecting the principles of international public law that it will no longer take advantage of the error of a judge to obtain the satisfaction coveted and the recrudescence of chauvinism, imperialism, jingoism, and nationalism which prevails at this moment among all peoples, threatens further to delay the arrival of that moment.

For any power the assistance of other governments is difficult to obtain; in each state the Minister of foreign affairs finds himself overweighed with the ordinary work of his department; what would his position be if he had to take the adventurous role of the redresser of wrongs?

As to the testimony of public conscience and of jurisconsults, one may hope that it will make itself heard in favour of the victim of a sentence illegally given : but time is necessary for the mobilisation of these reserve forces. Legal science and good sense require that the judge should be always presumed to have judged aright : *res judicata pro veritate habetur* and the litigant who attacks the sentence which has condemned him gets a scant hearing. When the voice of justice makes itself heard, the winning state has long ago marshalled its land and sea forces in the service of « right, at last recognised by an impartial tribunal ». Without doubt this tardy testimony of the public conscience and of jurisconsults is not to be despised, and in an age when public opinion is listened

to more and more every day, it is of great importance but it is nevertheless powerless to procure the restitution of indemnities wrongfully obtained.

In such circumstances as those in which Columbia was placed, events always follow one another in an invariable order; the Republic soon had experience of it.

It endeavoured at first to convince the Italian government of the illegality of paragraph V of the arbitration award; it also solicited the support of several neutral governments, but as might have been foreseen, this double attempt was fruitless. Italy replied that the Cerruti affair had already lasted only too long and that the Washington award must be carried out in its entirety (1); the neutral governments also had excellent reasons for not intervening in the dispute, even if it were only to avoid injuring the interest of several of their subjects who were creditors of the firm of E. Cerruti and C^o, and for whom Mr Cleveland had

(1) On July 23rd 1898 Italy, however, signed with the Argentine Republic a general treaty of arbitration, of which article 13 runs as follows :

« An application for revision may nevertheless be made before the tribunal which has pronounced sentence previous to the execution of the latter : Firstly if the said sentence has been given on a false or erroneous document; secondly if it has been in whole or in part the effect of a positive or negative error of fact, bearing on the interpretation of the deeds or documents in the case. »

done a good stroke of business by guaranteeing to them the payment of their claims.

2/ In the month of June 1898 ^AColumbia, seeing that no hope remained of obtaining a modification of the arbitration award, definitively notified to the Italian *chargé d'affaires* at Bogota that she would execute in its entirety the award of March 2nd 1897 ; she only added that the payment of the debts of the firm of E. Cerruti and C^o could not take place before the meeting of the chambers, since Parliament alone could open the necessary credit. The final settlement was at last drawing near, when another new incident arose.

8 Several creditors of the firm of E. Cerruti and C^o had hastened, on learning the arbitration award of M^r Cleveland (1), to serve on the Italian Minister of foreign affairs attachments on all the sums which might be paid over by the Columbian government on account of M^r E. Cerruti. As the creditors of the firm of E. Cerruti and C^o were numerous and of various nationalities, writs came in from all sides and there was a race among the Italian, French, ^AEnglish, German, and Columbian creditors to obtain judgment against the former *commandité* of the firm of E. Cerruti and C^o.

(1) Some of the creditors did not even wait for this award : the signature of the protocol of Castellamare had appeared to them to be a sufficient reason for acting, Cf. the example, already mentioned, of the firm of Isaac and Samuel, London.

That these proceedings should be taken was natural and they had been so clearly foreseen by the honourable arbitrator that in order to protect M^r Cerruti he had condemned the Republic of Columbia to « guarantee the said Signor Ernesto Cerruti against any and all liability on account of the debts of the said copartnership and to reimburse Signor Ernesto Cerruti to the extent that he may be compelled to pay such bonafide copartnership debts duly established against all proper defences which could and ought to have been made and such guaranty shall include all necessary expenses for properly contesting such partnership debts. »

Since by virtue of this provision of the award of the President of the United States, Columbia was to guarantee M^r Cerruti against any liability, to the extent of the debts of the firm of E. Cerruti and C^o, we only need, in order to learn the obligations of the Republic of Columbia, to recall here the principles of guaranty, as they are formulated in all legislation since the Roman Law.

The guarantor, say ~~M^r~~ Aubry and Rau (4), must in the first place abstain from making any claim which would tend to disturb the guarantee or to deprive him of part of the advantages on which he reckoned...

(4) According to the traditional usage these juriconsults study the obligation of guaranty with reference to sale and use the words buyer and seller instead of the expressions guarantee and guarantor, which we have substituted for greater clearness.

d/ (party receiving guaranty.)

The obligation of guaranty, in the second place, imposes on the guarantor the duty of taking up the defence of the guarantee, when another person makes with respect to the thing guaranteed some claim founded on a cause anterior to the contract.....

Lastly the guaranty further obliges the guarantor, when he has not succeeded in bringing about a cessation of the disturbance and the guarantee is ousted from the enjoyment of the thing guaranteed, an indemnity equal to the loss which the guarantee has thereby suffered (1).

If we apply these principles to Columbia, we shall see that the Republic was under three obligations.

Firstly, if she had herself been a creditor of the firm of E. Cerruti and Co, she would have been bound to abstain from taking proceedings against the *commandité* Mr Cerruti, since the first duty of the guarantor [^] and the easiest to discharge consists in abstaining from [^] doing the injury that one would be obliged to repair, if it emanated from a third person.

In the second place, if a creditor of the firm of E. Cerruti and Co proceeded against Mr Cerruti, the Columbian government, in concert with Mr Cerruti, was bound, if occasion arose, to make all its efforts to show that this debt did not exist, whether it were that it had already been paid, or had never existed, or had been irregularly contracted, or

(1) *Cours de droit civil français*, by M^{rs} Aubry and Rau, fourth edition, vol. IV, p. 369 and 370.

by reason of any other circumstance ; the President of the United States made allusion to these contestations when he spoke of claims duly established against all proper defences which could and ought to have been made.

Lastly, if the claim presented against the firm of E. Cerruti and C^o appeared incontestable — and in practice these claims would certainly be the most numerous — Mr Cerruti was to submit to the Columbian government the titles on which this claim rested, and when the right of the creditor had been duly verified and the amount of his claim recognised as correct, the Columbian government was under the obligation to pay the amount ; if it did not do so, the creditor would proceed against Mr Cerruti, who, in his turn, would make the Columbian government a party to the case, and on the same judgment would on the one hand condemn Mr Cerruti to discharge the claim of the creditor and on the other hand condemn the Columbian government to pay the creditor directly or to reimburse to Mr Cerruti with costs, the amount that the latter had paid to the creditor (1).

Such was the legal situation resulting with respect to this point from the sentence of the President of the United States : the latter had not decided that Columbia

(1) In this paragraph it is assumed that the Columbian government would accept the jurisdiction of an Italian tribunal.

would in future be substituted for M^r Cerruti in his relations with the creditors of the firm of E. Cerruti and C^o. Perhaps M^r Cleveland had desired to do so — we cannot tell — but he had not done so *for the peremptory reason that it was impossible for him to do it*. When a person has contracted a debt, no power on earth can liberate the debtor, unless he discharges the debt itself, and all the means one can assure to the debtor for obtaining its re-imbursement leave the right of the creditor to proceed against his debtor unimpaired.

One feels rather ashamed to have to recall such elementary principles, but it is necessary to do so, since certain persons have, in this painful Cerruti affair, persisted in ignoring them.

Accordingly when, in 1897, creditors of the firm of E. Cerruti and C^o took proceedings against M^r Cerruti they were within their absolute right; the defendant had only to inform Columbia of these proceedings, and the state would have executed its obligation. > /

But M^r Cerruti thought that it would be much more simple to obtain the direct substitution of Columbia for himself with regard to the creditors; he affirmed that if a single person took proceedings against him for the payment of the debts of the firm of E. Cerruti et C^o the sentence was not respected, and that he was entitled to be relieved from all judicial claims. This pretension, which, under the pretext of screening M^r Cerruti from , /

proceedings, tended to nothing less than obliging Columbia to pay at the first requisition every serious or alleged claim, that the first comer might have pretended existed for his benefit, was favourably received by the Italian government which for the purpose of enforcing it made use of measures of questionable propriety.

By the irony of things, Italy was preparing to resort to means of coercion at the very moment when a learned Italian juriconsult, a senator of the Kingdom of Italy, published, in the *Revue de Droit International et de législation comparée*, an article in which were enumerated the seven causes of nullity which invalidated the award given by Mr Cleveland in the Cerruti case (1).

On June 11th 1898 Mr Pironne, Italian *chargé d'affaires* at Bogota, took leave, very courteously however, of the minister of Foreign Affairs, on the pretext of an absence of some months.

On July 10th the Italian Minister of Foreign Affairs summoned Mr Hurtado to a private conference at which he informed him that « in proof of good will » it had been decided some time before to entrust the arrange-

1) *La nullité d'un arbitrage international*, by Mr Auguste Pierantoni, senator of the Kingdom of Italy. member of the Institute of international Law. *Revue de Droit International et de législation comparée*.

ment of the questions relating to the award of the President of the United States to the admiral in command of the West India Fleet (1) and that the said fleet would arrive two or three days later off the coast of Columbia. The minister further added that this interview was purely a concession on the part of his government, made in the hope that the executive power would authorise Mr Hurtado to intimate complete acceptance of the award with the formal engagement to pay the creditors of M. Cerruti within a period of three months. He asked for a reply before the 13th in order to be able to countermand the admiral's instructions.

At the moment when Mr Hurtado's despatch relating to this interview was received at Bogota, the Italian squadron consisting of four cruisers was already within sight of Carthagena, and some time afterwards

(1) For the second time Italy employed these tactics, which had already been successful in the case of commander Cobiauchi. One cannot protest with too much energy against this substitution of admirals for ordinary diplomatic agents. When a government refuses to receive the *legitimate* grievance brought to its attention, it is just and natural that the representation of the diplomatist should be supported by naval forces, but there is nothing in common between such an act and the substitution of a naval officer for a *chargé d'affaires*. The honesty and good will of the one are not less than those of the other, but the exercise of their respective professions produces in each a different temperament and if nobody would think of putting *chargés d'affaires* in command of a fleet, why, if one desires peace, put diplomatic negotiations in the hands of admirals?

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another cruiser the « Etna » cast anchor in the port of Bonaventura.

The squadron came as if on a peaceful visit. Indeed when in entering the port of Carthagena, the passage of which is very difficult in certain places, one of the vessels, the *Carlos Alberto*, found itself for a moment in a critical situation, the authorities of the port sent a pilot to her assistance.

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Suddenly, on July 22nd, Admiral Candiani addressed to the Columbian Minister of Foreign Affairs the following note :

Carthagena, July 22nd 1898,

His Excellency the Minister of Foreign Affairs, Bogota.

Your Excellency is aware that the Cerruti claim after giving rise to long discussion between the Italian and Columbian governments was, by a common accord, submitted for definitive settlement to the examination of the President of the United States of North America. The award which was pronounced, on March 2nd 1897, by President Cleveland was accepted in its entirety by Italy ; but on the side of the Columbian government it has hitherto been only partially executed.

The government of His Majesty has taken the firm resolution to settle as early as possible and definitively this Cerruti case, even with respect to that part of the arbitration award which has until the present remained in suspense, in order that there may remain no ground of controversy between the two governments. Accordingly the Royal Italian Government has conferred upon me the honourable task of addressing some communications to Your

Excellency, in continuation of those which have been exchanged through diplomatic channels between the governments of Italy and Columbia. The government of His Majesty has instructed me to demand through your agency that the government of the Republic should declare explicitly and without reserve or restriction that it is prepared to execute completely and integrally the award given by President Cleveland on March 2nd 1897 and that in conformity with this award it engages to procure the cessation of all proceedings against Mr Cerruti on the part of his creditors. The Italian Government further demands that this obligation, having been accepted, should be put into execution within a period of three months.

My government also instructs me to require from Your Excellency that within a period of ten days, after the presidential award has been accepted in its entirety, the government of the Republic shall place a deposit of £ 20.000 (twenty thousand pounds sterling) with the Hambro Bank, London, to the order of the Italian Government, either as guaranty of the strict execution of the above mentioned obligation, or for the purpose of giving the Italian government the means of meeting the consequences, direct or indirect, of the non-execution of the arbitration award or of delay in the said execution.

I take advantage of the occasion which is offered to me of communicating to Your Excellency the orders which I have received from His Majesty's Government, to express to Your Excellency my profound conviction of the existence of feelings of amity and equity between the two nations, which leads me to hope that the government of the Republic will receive favourably the demands of the royal government of Italy, in view of their moderation and the evident right on which they are founded.

I have therefore the honour to intimate to Your Excellency that not later than twenty days from the present note, I hope to

receive from the Columbian government an affirmative response with reference to the demands that I have had the honour to address to Your Excellency with regard to the entire acceptance of the arbitration award and the obligation to bring about, within three months, the cessation of all proceedings on the part of creditors, as well as to deposit the sum which is to be remitted as security.

I am to add that in accordance with the determination of His Majesty's Government, any negative response, even on a part of these demands, could only compromise the good relations at present existing between the two nations.

I am happy to express to Your Excellency my sentiments of distinguished consideration.

Rear-Admiral
Commanding the Oceanic
Naval Division,
Signed : C. CANDIANI.

It is only necessary to compare the terms of this note which was almost an ultimatum with those of the arbitration award, in order to see that Italy did not confine herself to demanding the integral execution of the award, but modified its terms to the detriment of Columbia. In the first place the demand of a deposit of 500.000 fr. with a particular London bank was altogether gratuitous and Italy substituted her own will for the judge's decision : and in the second place the terms used in formulating this demand could only humiliate Columbia, whose good faith and solvency were both suspected.

Italy could not compel Columbia to bring about a

cessation of all proceedings against Mr Cerruti, on the part of his creditors, since these very proceedings were necessary to establish the right of these creditors and the amounts owing to them. Moreover it would be a strange legal theory to affirm that a guarantor is bound to defend the guarantee against all attack : the attack must be founded on grounds which put in question the responsibility of the guarantor. Now nothing could be more doubtful than the legality of the actions to enforce attachment, commenced by several creditors against Mr Cerruti; indeed, some months later, the Italian court of cassation declared that these actions were ill founded and that the indemnity accorded by the arbitration award of Washington could not be seized by the creditors. ^ > /

But whilst awaiting the realisation of the admirable words of Mirabeau, quoted by Mr Merignhac at the head of his *Traité de l'arbitrage international*, « the day will come when right will be the sovereign of the world », the weaker states have often no means of resisting the better armed states. Accordingly Columbia hastened to present to congress, then sitting, a bill which was voted without delay and of which the following is the text :

FIRST ARTICLE.

The government of the Republic is authorised to continue the execution, in all its parts, of the award given by the ex-president

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of the United States of America, Mr Grover Cleveland, as arbitrator in his capacity as such president, in the dispute arising out of the claim of the Italian subject, E. Cerruti. It is understood that the faithful execution of article V of the said award, to which the Republic is bound, after the government, exercising its absolute right, has exhausted all possible means for obtaining its revision, does not imply that Columbia accepts this particular case, as a judicial precedent for similar cases, nor the theory according to which the operation of international law might be extended to associations which only exist by virtue of the internal laws of a state and consequently must be regulated by these alone.

The sum which may be necessary for the execution of this article will be considered as included in the budget of expenses.

ART. 2.

The issue is hereby authorized in paper money of a million of piastres which will be immediately deposited with a respectable bank to the order of the diplomatic representative of His Excellency the President of the Republic of the United States, as security for the faithful execution of the said award, a security which is offered to the arbitrator who decided the said dispute as a spontaneous act, seeing that there has been on the part of the American government no compulsory measure of any kind on this subject, and that, on the contrary, the obliging intervention of the United States in favour of Columbia is well-known in the present circumstances.

This complete and explicit acquiescence (1) should, it

(1) The following is the communication of the Minister of foreign affairs :

would have seemed, have given full satisfaction to Italy : indeed the diplomatic agents of the neutral

Bogota August 10th 1898

Rear-admiral Candiani, Carthagená

The Minister of Foreign Affairs has this afternoon received Your Excellency's note dated Carthagená, July 22nd, and I hastened to communicate it immediately to His Excellency the Vice-President of the Republic. In execution of the orders that I have received from the chief of the state, I reply to your note without examining for the moment the preliminary question of the credentials of Your Excellency and of Your Excellency's title to act the part of an intermediary in an affair of a diplomatic character. First of all I must inform Your Excellency that as soon as my government became certain that the government, which had acted as arbitrator, would not modify the award given, the representative of Italy at Bogota, and the other diplomatic agents were promptly informed that the re-assembling of the chambers was awaited, for the purpose of demanding the necessary authorization with respect to the execution of article 5 of the arbitration award, a resolution which was taken note of by Mr Pironne who declared himself satisfied. The situation to which the note that Your Excellency has addressed to me in virtue of the orders received from your government refers, does not at present exist : the arbitration award has been accepted in all its parts with the explicit-approbation of the Congress ; the foreign diplomatic representatives, representing creditors of Cerruti, have received full and entire security that the claims will be paid. They showed themselves satisfied and telegraphed to this effect to their governments ; lastly the Congress without constraint or demand of any kind has voted a credit for a sum three times as great as that demanded by the Royal Italian government, and this sum has been deposited to the order of the diplomatic agent of the United States in Columbia with a bank of which the German Consul is manager, as security for the execution of article 5 of the award. The Italian government cannot claim more from Columbia. The advocate of Cerruti at Washington has telegraphed to Rome that he thinks the measures taken by Columbia ought to be accepted. All the difficulties raised by the award of President Cleveland

powers to whom it was communicated telegraphed to their respective governments that Columbia had given full security, and the advocate of Mr Cerruti telegraphed to Rome to the same effect.

However this acquiescence still failed to satisfy admiral Candiani who had set his heart on obtaining an assent in terms identical with those contained in his own note. He did not even wish to leave Columbia the very modest satisfaction of having appeared to save appearances, desirous of inflicting on the Republic a new affront, When he had been advised by telegraph of the vote of Congress, he hastened to draw up the following ultimatum :

Carthagena August 13 th.

I have received to-day the despatch, of the 10th instant, of His Excellency the Minister for Foreign Affairs. I take note of the integral acceptance of the arbitration award, but I also remark the omission to reply to two points, namely :

1. Whether the Columbian government intends to undertake to bring about the cessation of all proceedings by creditors of

having come to end, any other demand on the part of the royal government would be destitute of just foundation, and would exceed the rights to which Italy can lay claim in virtue of the said arbitration award. I do not doubt that Your Excellency and the Royal Italian government will thus understand it and in this assurance, I beg Your Excellency to receive the expression of my distinguished sentiments.

Signed :
FELIPE F. PAUL.

Mr Cerruti within a period which was fixed in my note of July 22nd at three months, and which I have now been authorized to extend to eight months.

2. Whether the Columbian government intends to deposit with the Hambro Bank, London, a sum of twenty thousand pounds sterling to the order of the Italian government within the period indicated in my note of July 22nd last. A telegram from my government, received to-day, instructs me to require immediately an answer on these two points. Accordingly I allow the Columbian government until the 15th instant inclusive, to give me a simple affirmative answer on the two above mentioned points, in default of which I shall make use of the military resources at my disposal. With sentiments of the most perfect consideration, etc., etc.

Rear-Admiral,

C. CANDIANI.

It was not difficult to guess what was the use which Admiral Candiani intended to make of his military resources, for the commander of the squadron invited Italian subjects aboard and steamed further out from shore.

Thus under the pretext of procuring the execution of an arbitration award, tainted with several causes of nullity, Italy availed herself of her superiority in naval forces deliberately to impose humiliating conditions, dictated by her good pleasure, on another state, and threatened in case of refusal to bombard a peaceful and defenceless town (1) of 30,000 inhabitants.

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(1) One of the most illustrious jurisconsults of Italy, Professor Pasquale Fiore has written the following admirable words :

« From our point of view bombardment is not a means of

The gravity of these facts was increased by the circumstance that the Italian squadron was mobilised^Λ not to defend the rights of an Italian subject^Λ — for the subsequent decision of the Roman court of cassation showed that Mr Cerruti had no interest in the accomplishment by Columbia of the act imposed upon her^Λ — but solely in the interests of English, French, German, and even Columbian creditors.

Italy believed she was supporting the rights of her subject who complained of attachments served by the creditors of the firm of E. Cerruti and C^o on the fifty thousand pounds sterling which he had still to receive from the Columbian government. Now on February 28th 1899, the Italian court of Cassation decided that these attachments were null and illegal : it held, on account of the international character of the arrange-

attack in harmony with modern times : it is the most deplorable abuse of force, the most ruinous and most unfair operation of war, when it is directed against towns inhabited by peaceful citizens, even when these towns are defended by a garrison ; and it must always be considered as a public outrage, as a manifest violation of the right of persons and nations, which the necessities of war can only excuse in really exceptional cases ».

« Bombardment » says Mr Pillet « is the gravest of all the measures of which a general can assume the responsibility. It comes into direct collision with the first principles of the law of nations, which command us only to attack those who can defend themselves, and it disregards the great law of reason, which requires that one should not do more injury than is necessary to attain the end for which a war has been undertaken » (Pillet, *Le Droit de la Guerre*, p. 169).

ments which led to the allocation of the indemnity, that the latter was withdrawn from the ordinary application of internal laws and that no obstacle could be placed to the free payment of the sum of 50,000 pounds sterling into Mr Cerruti's own hands.

This solution seems just and it is to be regretted that it was not perceived by the illustrious American arbitrator : it would have prevented what I may be permitted to call the *international scandal* of the month of August 1898, when — we must not be afraid to repeat it — Italian ships of war threatened to bombard a Columbian port in order to defend the rights of English, French, German, and even Columbian citizens !

Be that as it may, at this date of the month of August 1898, events were about to take a course which it was not difficult to foresee. In presence of the attitude of Admiral Candiani, the Columbian government had forwarded him by telegraph the following response :

Bogota, August 13th 1898

To Rear-Admiral Candiani, Cartagena.

In reply to the note last communicated by Your Excellency to the governor of Bolivar, from which it appears that Italy persists in imposing on the Republic demands which are contrary to the provisions of the arbitration award of President Cleveland, and which consequently are in violation of our rights, and that she prepares to support these demands by force, the Government, not having the material means of opposing the unusual proceedings of the Royal government, after raising a formal protest against

the conduct pursued by Italy towards a friendly nation, declares that it will put an end to all the claims of the creditors of Cerruti within eight months and that it will deposit within the time fixed by the ultimatum the sum of 20.000 pounds sterling with the Hambro Bank, London, at the disposition of the Italian government. I take advantage of this opportunity to affirm again the good faith of the government of the Republic and its firm intention to execute, as already authorised by Congress, all the obligations of the award without constraint of any sort.

With sentiments of high consideration, I am, etc.

PAUL.

The sum of twenty thousand pounds sterling was immediately deposited by the government of Columbia at the Hambro Bank, London, and not many days afterwards the Italian squadron left Columbian waters, after Admiral Candiani, in a last note to the governor of Bolivar, had expressed his confidence that « in the future the greatest and most solid friendship would reign between the people of the two states » (1).

(1) A great French journal published at this time an article on the Cerruti case, in which it affirmed that « all the governments of Europe had reason to congratulate themselves, on the happy solution which had taken place »; it also added that « the Italian journals congratulate themselves on this result, of which they attribute the merit to the Minister of Foreign Affairs, Admiral Canevaro, *who, like a soldier, decided not to allow himself to be imposed upon.* » Would it not be more interesting to know whether as Minister of Foreign Affairs, Admiral Canevaro respected the principles of International Law?

Columbia contented herself with breaking off diplomatic relations with the Kingdom of Italy and withdrawing the *exequatur* from the Italian consuls. She hastened to take the necessary measures for the speedy settlement of the debts of the firm of E. Cerruti and C^o and as if it were fated that in this unfortunate affair the legal irregularity of the sentence of 1897 should continue in evidence to the end, she signed, in December 29th 1898, with M^{rs} Ernest Bourgarel, Minister plenipotentiary of the French Republic, Juan Luhrsen, resident minister of the German Empire and Montagu Villiers, *chargé d'affaires ad interim* of Great Britain, a protocol for the nomination of an international commission of three members, instructed to fix the total of the debts of the firm E. Cerruti and C^o. The members were to be appointed, one by Columbia, another by the three foreign diplomatic agents signing the protocol and the third by the two other members. - /

This commission was not able to get to work, on account of disagreement among the members as to the extent of its powers. At last, on February 8th 1899 M^r Carlos Cuervo Marquez made an order for taking direct cognisance of the claims of foreigners and Columbians against the firm E. Cerruti and C^o.

In these proceedings there was never any question of the interests and rights of an Italian subject, and it was in consequence of the diplomatic intervention of Italy that Columbia found herself obliged to extinguish

the claims of the English, French, German, and even Columbian creditors (1).

After the ministerial order of M^r Carlos Cuervo Marquez, the Columbian Minister of Foreign Affairs exchanged negotiations with the various creditors of the firm of E. Cerruti and C^o, and proposed to pay each the capital of his claim and twenty per cent in addition as interest. This equitable proposition has been accepted by a great number of creditors who have already been re-imbursed and it will certainly be accepted by the other since Columbia is only strictly bound — on the assumption that the firm of E. Cerruti and C^o was solvent, an assumption which has not been pro-

(1) These claims were divided by the ministerial order into three classes :

1. With reference to foreign claims the government will enter upon negotiations with the respective foreign ministers representing the said creditors. If these steps do not lead to any result judicial proceedings will be opened in the ordinary form for the purpose of fixing the liability of Columbia with respect to these claims ;

2. Columbian creditors will address themselves to the ordinary tribunals for the determination of their respective claims, unless they consent to settle them directly with the government, in view of which they are offered conditions identical with those under which foreign claims will be settled ;

3. As to the claims of the partners in the firm of E. Cerruti and C^o in respect to the shares brought by them into the business — claims which necessarily entail a previous order of liquidation which will determine their rights and the obligations which correspond to them, — the necessary steps must be taken before the judicial authorities.

ved (1) — to pay the capital without interest (2). Moreover the royal Italian government has declared the proposal to be perfectly satisfactory.

Unless some unforeseen incident should occur, the Cerruti affair may be considered as finally settled. The history of the difficult negotiations of which it has been the occasion carries with it, as we have seen, lessons of various kinds; above all it may perhaps induce publicists, who have taken up the noble mission of combatting the double scourge of war and armed peace, to effect in the procedure of international arbitration the numerous improvements of which it is capable.

At the very hour when these lines are written, *the Peace Conference* — what a magnificent name! — opens its sittings at the Hague. May we not express the hope that it will not engage in the study of utopian schemes for the limitation of military effectives and the renunciation of the essential rights of states to develop and above all perfect their armaments? The delegates of the United States of America will, it is said, submit a scheme

(1) *Vide infra* Appendix.

(2) The interest on money debts only dates from the day when legal proceedings are taken. Cf. art. 1153 French Civil Code.

of international arbitration which will have the support of England ; if this report be well founded, we must congratulate ourselves on it : therein at the present moment is the only practical solution. Let precise rules be laid down on the composition of tribunals of arbitration, let rules of procedure be fixed, especially for the dealing with proofs, and let ordinary and extraordinary means of appeal be provided, and a useful work will have been accomplished.

On these points as on others, the Institute of International Law has opened the way and prepared the work : it would therefore be easy for the various governments to promulgate the code of the procedure of international arbitration (1). Let the Peace Conference accomplish this task, and leave it to Providence to bring to an end the ~~dis~~astrous system, which ruins Europe, and in the midst of peace maintains more than two and a half millions men in arms. In spite of all protests and all resistance, the economic evolution of commu-

(1) It is difficult to measure the importance of this immense progress. The protocols of arbitration signed by litigant states, as a rule, barely formulate one or two rules of procedure, and as everything is left to the will of the judge, governments are less inclined, in view of this element of hazard, to have recourse to arbitration.

It may be imagined what litigation between private persons would be like, if states, instead of promulgating fixed rules of procedure, left to the parties themselves the task of determining them in each instance.

APPENDIX

Mr Grover Cleveland, in his arbitration award of March 2nd 1897, granted to Mr Cerruti an indemnity of 60.000 pounds sterling; Columbia persistently maintained that this sum was far too large and her conviction on this point contributed to increase the warmth of her protests.

In order to preserve the purely judicial character of this study of the Cerruti case, the author has thought proper to exclude from it any examination of the pecuniary interests concerned in the Italo-Columbian dispute; but it will not be out of place to offer here some observations on the subject.

As the illustrious arbitrator rejected every demand for an indemnity on account of moral damage suffered by Mr Cerruti, — paragraphs *a* and *b* of the claim (1) — we must conclude that the material damage caused to Mr Cerruti, the prejudice really suffered by him in his private estate, amounted to 60.000 pounds sterling.

The available estate of Mr Cerruti consisted of two

(1) *Vide supra* p. 83 — The claim of Mr Cerruti on account of moral damage amounted to 90.400 pounds sterling.

kinds : on the one hand real and personal property belonging to him directly, and on the other hand his right to withdraw the share contributed by him to the *société en commandite* E. Cerruti and C^o and to receive after the restitution of the shares of the other partners, thirty per cent of the net assets.

But when we try to find out what the first of these two elements in the fortune of M^r Cerruti consisted of *we cannot do so* : indeed even if we take the text of the conclusions of the learned advocates who sustained the claimant's interests at Washington we see that this first element reduced itself to a single property, the *hacienda* at Salento.

Now this property at Salento was not the private property of M^r Cerruti : it belonged wholly to the firm of E. Cerruti and C^o.

This assertion has been warmly contested by M^r Cerruti, but its accuracy, nevertheless, is not open to question. According to Columbian law landed property can only be transferred by notarial deed (*escritura publica*) and the deed relating to the sale of the *hacienda* al Salento to the firm of E. Cerruti and C^o was produced at the arbitration proceedings at Washington without M^r Cerruti being able in any way to weaken the testimony of the document (4).

(4) This sale deed has been reprinted with the official docu-

The Spanish government, in its proposal of mediation in 1888, also unhesitatingly attributed the ownership of the *hacienda* at Salento (1) to the firm of E. Cerruti and C^o. The property also appeared on the business books of the firm for a sum of 64.787 dollars.

All the evidence therefore is perfectly consistent and one fails to understand how Mr Cerruti was able in its presence to persist in such gratuitous statements.

ments : *Supplemental Documents filed by Columbia*, p. 13. The following are the opening lines :

Number ninety-two. In the district of Cali, sovereign state of Cauca, United States of Columbia, the twenty-ninth of september one thousand, eight hundred, and seventy nine, before me, Manuel Santiago Vergara assistant notary of office n^o 2 of the division of Cali, and the witnesses, Mrs Fernando G. Micolta and Pablo Meza, residing in the said division, being of legal age, good reputation. and not under any legal disability : Mr Belisario Buenaventura residing in this district and being of legal age, whom I know has presented himself and stated : that he sells in full and perpetual property to Mrs E. Cerruti and Co. merchants in this city, having legal age and whom I know : the estate at Salento, situated in this division, in the district of Yumbo... » (Here follow the description of the estate and the clauses of the contract.)

By the terms of article 3, the price is fixed at 24.000 pesos (103.000 francs). A partial payment was made by means of the transfer of a house, situated in the quarter of St-Peter of the town of Cali, and belonging to Mr José Quilici, one of the partners. Besides the signatures of the notary and the witnesses the following signatures are appended : Belisario Buenaventura ; E. Cerruti and C^o.

(1) The Spanish mediator thus expressed himself : « By a contract, dated September 29th 1879, Belisario Buenaventura sold to the firm of E. Cerruti and C^o, merchants at Cali, the property called Salento, situated in the district of Yumbo, comprising a house with all its furniture arable and meadow lands, goats, horses, and various implements... »

As the *hacienda* at Salento was the property of the firm of E. Cerruti and C^o and not of M^r Cerruti privately, it follows that the first element of prejudice alleged by the latter completely disappears : for once more let it be said, M^r Cerruti has never complained of any other direct damage.

There remains the second head of M^r Cerruti's claims, that which has its origin in his right to withdraw his share in the firm which bears his name and to receive, after the restitution of the shares of the other partners, the equivalent of 30 per cent of the net partnership assets. If we are to believe the statements of the honourable American advocates, the share contributed to the business by their client amounted to 129.376 dollars and his right to 30 per cent of the net assets might be valued, after an examination of the business books, at 13.160 dollars : which, according to the rate of exchange, would represent a total sum of 24.374 pounds sterling (1).

But it is evident that M^r Cerruti could not obtain possession of this amount of more than 600.000 francs — already a considerable sum — if the firm of E. Cerruti and C^o was not solvent in 1885 : and we ought

(1) Brief on behalf of Ernesto Cerruti, submitted by M^{rs} Frederic Coudert and Mallet Prevost, p. 178. — These advocates added the compound interest of this sum at 7 per cent., namely 26.700 pounds sterling, and they thus obtained a total of 51.074 pounds.

therefore to ascertain the state of the firm's affairs on december 31st 1884.

Although it is impossible to ascertain this state with perfect accuracy, it can be done with a sufficient degree of approximation.

The books of the firm of E. Cerruti and C^o have been preserved and they were examined in 1893 by two experts. one an Italian, M^r Lorenzo Codazzi, the other, a Columbian, M^r Federico Balcazar, nominated by the two governments.

From the report of these honourable experts it appears that the balance of stock of the firm would have represented, after the restitution of the partners' shares, a net profit of 17.567 dollars, a very modest sum compared with the figures put forward by M^r Cerruti (1).

But it is impossible to guarantee that this net profit ever really existed : the task of the two experts was, as M^r Codazzi himself has stated in writing, « not to judge the affairs of the firm of E. Cerruti and C^o, but only to prepare, according to the firm's books, a general balance of accounts » (2).

(1) Balance Sheets of the houses of E. Cerruti and C^o, pages 14 et seq. — Let us note by the way that in this stock-taking of the firm of E. Cerruti and C^o, the *hacienda* at Salento figured for a sum of 64.787 dollars.

(2) Italian Green Book : Documenti riservati, 1893.

The importance of this observation will not escape the attention of anybody possessing a slight acquaintance with book-keeping. The assignees of a debtor's estate often receive proof — and receive it without surprise — that the almost complete insolvency of a merchant is not incompatible with accounts showing large profits. In order to produce such an erroneous impression, too often intentional, it is sufficient to refrain from « passing through the profit and loss account » the claims of insolvent debtors, depreciated goods or machines that are worn out or useless. The assets are then unduly swelled by several hundred thousand francs.

If we are to believe the supplementary report of the Columbian expert, Mr Federico Balcazar (1) it seems that the book keeping of the firm of E. Cerruti and C^o showed several deficiencies or omissions of this sort.

Thus, in the first place, the business books of the Cali house showed on the side of assets a sum of 73.614 dollars, which as a matter of fact, was only represented by claims that were almost irrecoverable, and there were similar grounds for cancelling a sum of 33.856 dollars set down among the assets of the Bonaventura house.

(1) Report addressed to the Minister of Foreign Affairs, May 31st 1897.

This observation, which has reference to the special accounts of each of the four houses, also applies to the general accounts of the firm and if we are to adopt the testimony of the honourable Columbian expert, a sum of 260.362 dollars — current accounts and consignments — required to be reduced to 78.108 dollars (1). Lastly it was necessary to make considerable reductions under the heading « stock », for quinquina and caoutchouc, set down at their purchase price of 1883, had undergone an important depreciation, of which the books bore no trace.

After thus debiting the profit and loss account with the different sums, which, after a serious stock taking, there seemed to be no chance of recovering, Mr Federico Balcazar found that the firm of E. Cerruti and Co had in reality a deficit of 117.728 dollars.

Stock taking is so delicate a matter and there are so many ways of estimating the chances of recovering doubtful debts or the value of goods in stock that it is impossible to guarantee the rigorous accuracy of the balance sheet prepared by the honourable Columbian expert ; but the document may be compared with ano-

(1) This considerable reduction is all the more necessary because the firm of E. Cerruti and Co appears to have been accustomed every six months to debit the accounts of its debtors, even those who were far from solvent, with the total compound interest at 7 per cent per annum, so that the claim of the firm increased in direct proportion to the insolvency of the debtor.

ther balance sheet, communicated by Mr Pisani Dossi, resident Italian minister at Bogota which also showed a net deficit of 6.845 dollars (1).

From testimony of such widely different origin one may infer that the affairs of the firm of Cerruti and C^o were far from being so prosperous as the manager affirmed and one understands why for so many years he struggled for the payment of an indemnity consisting of a lump sum, fixed diplomatically and without previous examination of the firm's books. One also understands why Mr Cerruti feared to be « sacrificed » by the commission of Bogota ; lastly there is no longer any difficulty in explaining why he persisted in spite of all the evidence in affirming that the *hacienda* of Salento was his private property ; since the liquidation of the affairs of the firm of E. Cerruti and C^o would have scarcely left net assets, sufficient to restore each partner the amount of his share, it was to Mr Cerruti's

(1) Italian Green Book : *Documenti riservati* 1895, p. 138. — Appended is a summary of the balance sheet :

	Assets	Liabilities
I Foreign creditors		379.762
II Columbian creditors.....		79.301
III Debtors : landed properties.....	132.356	
IV Debtors : Columbian Government....	187.846	
V Various debtors.....	132.016	
	<hr/> 452.218	<hr/> 459.063
Net liabilities.....	6.845	
	<hr/> 459.063	<hr/> 459.063

interest to attribute to himself a considerable private estate, in order to increase his chances of obtaining a large indemnity (1).

An examination of the accounts of the firm of E. Cerruti and C^o enlightens us completely on this point, and it helps to make still more regrettable the ignorance in which the illustrious American arbitrator has left the litigants with respect to the estimates which led him to grant an indemnity of 60.000 pounds sterling.

Since the *hacienda* at Salento did not belong to Mr Cerruti personally and the confiscation of this estate was the sole element of direct damage alleged by the claimant, in addition to the indirect damage resulting from the confiscation of the possessions of the firm of E. Cerruti and C^o, it *follows necessarily* that the interest of Mr Cerruti in the firm must have represented *by itself* a sum of 60.000 pounds sterling. But the

(1) In order to increase his chances, Mr Cerruti employed a double means : on the one hand he improperly attributed to himself the ownership of the property at Salento, and on the other hand he set the *hacienda* down at a value *ten times as great as its real value* : in 1879 it had been bought for 24.000 dollars, or about 4.200 pounds sterling : now six years later, in 1885, Mr Cerruti estimated it to be worth 38.700 pounds, so that by adding to it the so-called expected profits, which should have been received during the years 1883-1894, 82.788 pounds, he claimed through the instrumentality of his advocates 121.488 pounds (*vide supra* the conclusions of the advocates, paragraphs c and d, p. 80).

interest of Mr Cerruti in the firm which bore his name could only have this value if the net assets of the firm, after the payment of the debts, amounted to the considerable sum of about 169.000 pounds sterling, a figure which exceeds threefold the most optimistic estimates of the learned advocates of Mr Cerruti (1) *and which is more than seven times as great as the sum fixed by the Italian and Columbian experts* — a sum

(1) This is how the calculation is worked out, in round figures :

The sum of 60.000 pounds sterling comprises to begin with the value of the share brought in by Mr Cerruti, 129.000 dollars, which at the rate of exchange of 1885 ought to be reduced by 14 1/2 per cent in order to be transformed into pounds sterling and is thus equivalent to about 22.150 pounds sterling.

The remainder of the sum of 60.000 pounds 60.000 -- 22.150 = 37.850, is the share of Mr Cerruti, 30 per cent, in the net assets.

But this share in the assets evidently can only be withdrawn after the restitution of the sums brought into the business by the other partners, which sums, even according to the testimony of Mr Cerruti's own advocates, amounted to about 119.000 dollars, or 20.400 pounds sterling ; and as Mr Cerruti's share in the assets apart from the amount which he contributed to the firm, 37.850 pounds sterling, is only 30 per cent, we find by means of

the rule of three ... $\frac{37.850 \times 10}{3}$ that these total assets amount-

ed, after deducting partners' contributions to capital, to the sum of 126.166 pounds ; so if we add up the total of these contributions we find that the net assets of the firm of E. Cerruti and Co after paying the partnership debts, amounted to the sum of $126.166 + 22.150 + 20.400 = 168.716$ pounds sterling.

Now the learned advocates of Mr Cerruti (page 176 of their statement) estimated that the net assets of the firm including partners' contributions to capital, might be put down at 313.000 dollars, or about 60.000 pounds.

the correctness of which moreover is acknowledged by Mr Cerruti himself (1).

We find here, therefore, a fresh ground for the nullity of the arbitration award of March 2nd 1897; all publicists and all arbitration agreements admit implicitly or explicitly that the award is null in case of evident error of fact when the arbitrator has given judgment *ultra petita* (2).

(1) Letter of Mr Brin, Italian minister of Foreign Affairs, dated August 27th 1893, Green Book 1895, *Documenti riservati*, p. 136.

(2) These observations also show that the creditors of the firm of E. Cerruti and Co have reason to congratulate themselves on the issue of the Italo-Columbian dispute, for it is not proved that their debtor was solvent in 1885, and the Columbian government nevertheless pays them the capital of their claims and 20 per cent besides.

SCHEDULE I

Decree n° 37 of the year 1898.

The Vice-President of the Republic invested with the Executive Power.

In consequence of the unforeseen and extraordinary proceedings lately employed by the Government of His Majesty the King of Italy with respect to Columbia.

Decreed :

ART. 1. — Diplomatic relations between Columbia and the Kingdom of Italy are declared to be broken off.

In consequence the legation accredited to His Majesty the King of Italy will be withdrawn, the diplomatic agents of the Italian government will not be received, and the *exequatur* will be withdrawn from the Consuls, Vice-Consuls, and Consular Agents of the said Government within the Republic.

ART. 2. — Italians domiciled in or passing through Columbia, or those who may come to Columbia, will enjoy as foreigners, in their persons and property, the protection of the authorities conformably to the national laws.

Done at Bogota, September 12th 1898.

JOSÉ MANUEL MARROQUIN.

Minister of Foreign Affairs,

FELIPE F. PAUL.

SCHEDULE II

REPUBLIC OF COLUMBIA

MINISTRY OF FOREIGN AFFAIRS

Bogota, february 8th 1899.

Your Excellency (1),

Mr Leo S. Kopp having withdrawn from the Commission appointed to ascertain the amount of the debts of the firm of E. Cerruti and Co and Your Excellency having declared, in your note of the 6th inst, that you do not consider it possible to fill up this vacancy, a matter in regard to which the representatives of Great Britain and of France are in agreement with Your Excellency, this ministry by a resolution dated to-day has decided to take steps for the direct cognizance of this affair in order to put an end to this deplorable question and to safeguard in that way the responsibilities of Columbia, in presence of the situation created to-day by the dissolution of the Commission.

In virtue of this decision I have the honour to make the following proposal to Your Excellency :

The government will pay in letters of exchange ninety days after sight the debts contracted by the firm of E. Cerruti and Co approved by this honourable legation, conformably to the original that I have the honour to send you enclosed, with the reserve of rectifications to be made by reason of any errors of account which may be proved.

In the expectation of a prompt reply I renew to Your Excellency the assurances of my very distinguished consideration.

CARLOS CUERVO MARQUEZ.

(1) This note was addressed individually to each of the representatives of Germany, Great-Britain and France at Bogota.

PROPOSITION

Which the Minister of Foreign Affairs makes to the Ministers of France and Germany and to the chargé d'affaires of Great-Britain for the payment of the debts of foreign origin of the commercial house of E. Cerruti and Co.

Original balance according to the books of E. Cerruti and Co.

The Government offer :

	GOLD CURRENCY			
	Dollars	Mills	Dollars	Mills
D. de Castro and Co..	84.540,	010	101.480.	012
Isaac and Samuel....	25.488,	350	30.586,	020
Wm Greenwood and Co	8.316,	290	9.979,	548
J. Goddard and Co...	34.416,	660	41.299,	992
J. Hart and Co.....	12.434,	840	14.921,	808
Schloss Bros	33.292,	330	39.950,	820
D. Migdley and Sons..	10.006,	580	12.007,	896
S. L. Behrens and Co .	8.515,	830	10.218,	996
S. L. Helm and Co....	9.050,	250	10.860,	300
Riems and Held (')...	1.924,	570	2.309,	484
Simon Hauer.....	3.589,	395	4.307,	274
M. Vengohechea and Co	27.528,	800	33.034,	560
C. Dellatorre.....	39.647,	800	47.577,	360
F. H. Lomarque and Co	2.134,	410	2.561,	292
G. G. Louis Babin Péty and Co.	869,	180	1.043,	016
Kissing and Mollmann	29.130,	460	34.956,	552
Pector and Ducoud Jr.	9.758,	700	11.710,	440
Angelo and C. Liberty.	77,	610	93,	132
R. Samper and Co....	14.131,	700	16.958,	040
M. Heurtematte and Co	2.240,	510	2.688,	612
Nicolas Novero	1.332,	660	1.599,	192
	377.436,	955	430.112,	346
Carried forward.....	430.112, 346			

(') It is believed from private information that the advances of the firm of Riems and Held are covered,

Brought forward..... 430.112, 346

SILVER CURRENCY

	Dollars	Mills	Dollars	Mills
Brilly and Ferrari . . .	70.000,	»	93.000,	»
Ch. S. Compbell and Co	1.273,	480	1.528,	176
M. Heurtematte and Co	4.566,	860	5.480,	232
Stgo French (Sugar)..	197,	410	236,	892
	84.037,	750	100.245,	300

Reduced to gold at a rate of exchange
of 200 per cent 50.122, 650

COLUMBIAN CURRENCY

	Dollars	Mills	Dollars	Mills
Gaspar Mazza.....	19.089,	335	22.907,	226
José Quilici.....	40.225,	432	48.270,	518
Stgo M. Eder.....	24,	155	28,	986
José Rossy.....	1.746,	075	2.093,	290
José F. Bolton.....	411,	680	494,	»
	61.496,	697	73.793,	020

Reduced to gold at a rate of exchange
of 300 per cent 24.598, 673

Dollars 504.833, 669

= Francs : 2.524.168.

= Pounds sterling : 100.966 (1).

The foregoing sums will be paid in money of the same currency as that in which the said debts were originally contracted.

Bogota, February 8th 1899.

REPUBLIC OF COLUMBIA

MINISTRY OF FOREIGN AFFAIRS

Bogota, February 13th 1899.

Sir,

Referring to the esteemed note of Your Excellency, dated the 11th of the present month, I esteem it an honour to inform Your Excellency that the proposition made by the Government to the foreign creditors of the firm of E. Cerruti and Co having a

(1) These two approximate values in francs and pounds sterling did not appear in the note of the Minister of Foreign Affairs.

general character, any sum offered to the English creditors, which may not be in accord with this basis of arrangement, will be scrupulously rectified before the payment is carried out; this rectification can be made by the special accountant of the Ministry Mr Federico Balcazar and an assistant chosen by Your Excellency and your honourable Colleagues. The said persons will equally proceed to make an examination with respect to the currency in which the payment should be made, the Government beeing prepared to recognize the debts in currency of the same kind as that in which the debts were contracted.

As for as new claims are concerned which may have been recognized by Columbian tribunals, the government will take as a basis for their acknowledgement not the general proposition made to the other creditors but the text of the judicial sentence; it will carry out these payments in conformity with the provisions of these sentences, unless it be proved that the claim has already been liquidated in whole or in part, or that an error of account has been committed, since this error, which is verifiable, can be demonstrated by an examination of the books of the debtor firm.

As to the date of payment, the government propose to remit to Your Excellency the letters of exchange within the twelve days after the date at which Your Excellency may communicate to this Ministry the acceptance by the English creditors of the terms of arrangement that I have had the honour to propose to Your Excellency.

I renew to Your Excellency the assurance of my distinguished consideration.

CARLOS CUERVO MARQUEZ.

To the Hon. M. Villiers, chargé d'affaires per interim of Great Britain.



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